MISSISSIPPI LAW JOURNAL

THE CIRCUMVENTION OF MISSISSIPPI'S PROHIBITION OF DIRECT ACTIONS

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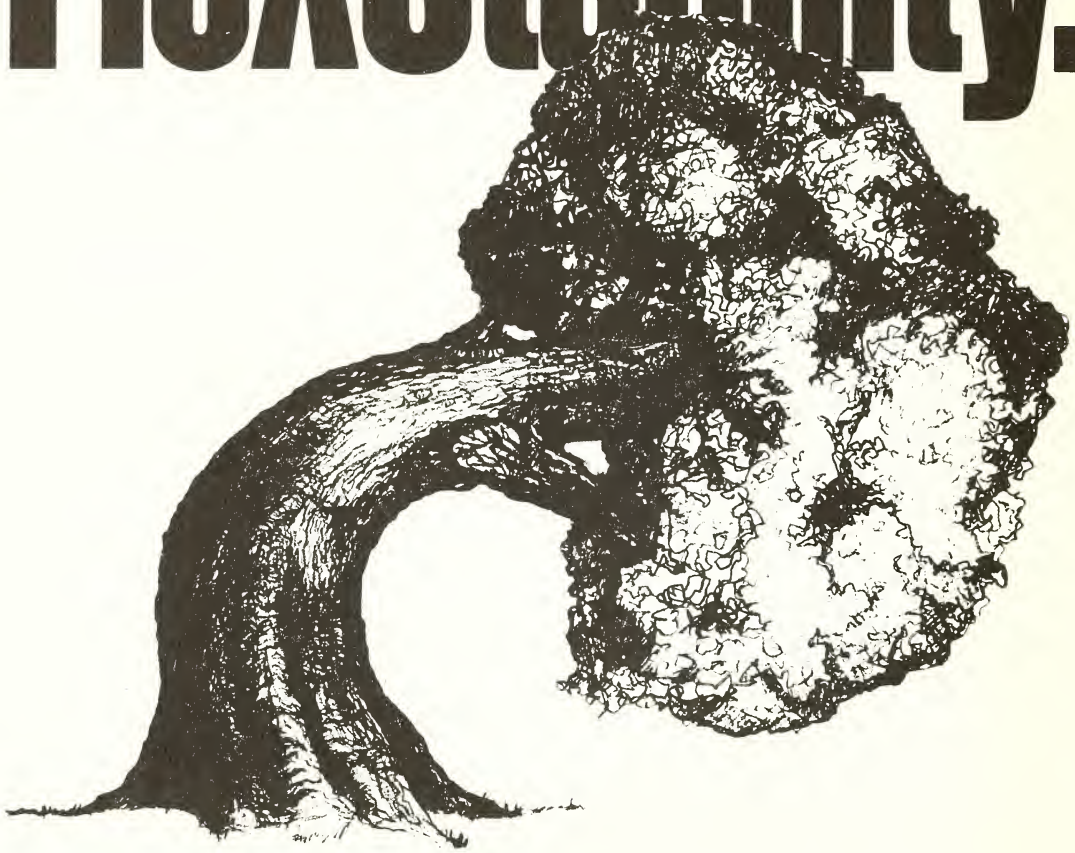

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THE CIRCUMVENTION OF MISSISSIPPI'S PROHIBITION OF DIRECT ACTIONS

William C. Walter[*]
Michael V. Cory, Jr.[**]

I. INTRODUCTION

Under Mississippi law, a third party claimant has long been prohibited from litigating a claim for damages directly against an alleged tortfeasor's liability insurer. As in many other states, Mississippi insurers are insulated from defending suits brought by strangers to the insurance contract.[1] Ordinarily, in order for the injured third party to have any enforceable rights under the tortfeasor's liability insurance policy, the third party must first establish liability by filing suit against and obtaining a judgement from the alleged tortfeasor. This widely held requirement is grounded, in part, upon the premise that any right a third party claimant may have against the insurer depends solely upon the liability of the insured.[2]

This Article will review the history of Mississippi law as it pertains to direct actions against liability insurers, as well as provide an analysis of the current law regarding this issue.

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[1] *See infra* notes 15-26 and accompanying text; *see also* KEETON, ET AL., INSURANCE LAW, § 9.9(c) (1988); *see, e.g.,* Stewart v. State Farm Insurance Co., 454 So. 2d 513, 515 (Ala. 1984).

[2] *See* Kohlmeier v. Shelter Insurance Co., 525 N.E.2d 94, 101 (Ill. App. Ct. 1988).

This Article will further attempt to identify and explain one emerging method by which third parties are circumventing this prohibition by bringing tortious breach of contract claims against the insurer's agents and adjusters.

II. DIRECT ACTIONS

A. The History of the Direct Action Prohibition

Under Mississippi common law, a third party could not bring an action against an insurer for benefits due under the insurance policy.[3] Mississippi's prohibition against direct actions is consistent with and derived from two well settled common law principles: first and foremost, the traditional rule of contracts that in the absence of privity, an action for breach of contract is not permitted;[4] and second, the evidentiary rule that testimony at trial concerning the presence or absence of liability insurance is highly prejudicial and therefore inadmissible.[5]

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[3] Westmoreland v. Raper, 511 So. 2d 884, 885 (Miss. 1987). In *Westmoreland*, the court noted that Mississippi's prohibition against direct actions "rest[s] upon our fundamental law that where no action exists at common law, a statute must create one." *Westmoreland*, 511 So. 2d at 885.

[4] Privity of contract is defined in BLACK'S LAW DICTIONARY as "[t]hat connection or relationship which exists between two or more contracting parties. It was traditionally essential to the maintenance of an action on any contract that there should subsist such privity between the plaintiff and defendant in respect of the matter sued on." BLACK'S LAW DICTIONARY 1199 (6th ed. 1990); *see Westmoreland*, 511 So. 2d at 885 (explaining that "[w]here there is no privity of contract, a suit for breach of contract cannot be maintained").

[5] The Mississippi Supreme Court first declared evidence concerning liability insurance inadmissible in the case of Herrin v. Daly, 31 So. 791 (Miss. 1902). The court concluded that evidence concerning the existence of insurance "could not conceivably throw any light on the issue, and could have no other tendency than to seduce a verdict on the ground that an insurance company, and not the defendants, would be affected." Herrin v. Daley, 31 So. 791, 793 (Miss. 1902). *See* Avent v. Tucker, 194 So. 596, 601-02 (Miss. 1940) (holding that evidence concerning presence or absence of insurance is not admissible); Petermann v. Gary, 49 So. 2d 828, 831 (Miss. 1951) (explaining that "reference by plaintiff's attorney in the trial of a case . . . to liability insurance coverage . . . is highly prejudicial and constitutes sufficient cause for the court to declare a mistrial").

This prohibition was incorporated in Rule 411 of the Mississippi Rules of Evidence, which provides:

> Evidence that a person was or was not insured against liability is not

The prohibition against direct actions was established by the Mississippi Supreme Court in the case of *McArthur v. Maryland Casualty Co.*[6] In *McArthur*, the court was called upon to decide whether Louisiana's direct action statute permitted an injured third party to file suit in Mississippi against an insurer based upon a Louisiana contract of insurance.[7] After first finding that Mississippi law was controlling, the court held that because there was no privity of contract between the injured third party and the insurer, the insurer could not be sued directly for the damages allegedly caused by its insured.[8]

The Mississippi Supreme Court arguably created an exception to this prohibition in the case of *Hodges v. Canal Insurance Co.*[9] In *Hodges*, the court refused to dismiss a cause of action brought by an injured insured plaintiff directly against her insurer under the uninsured motorist provisions of her insurance policy.[10] The court appeared to base its holding only on the fact that, in the context of an uninsured motorist claim, there was privity of contract between the insurer and insured.[11] Without discussion, the court stated that "[i]t seems obvious that appellant may bring a direct action against . . . her own insurer."[12] The court then expanded the

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admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

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[6] 186 So. 305 (Miss. 1939).

[7] *Id.* at 309.

[8] *Id.*; *see* Cook v. State Farm Mut. Ins. Co., 128 So. 2d 363, 367 (Miss. 1961) (holding that because Louisiana statute permitting direct actions against insurance companies is procedural and remedial, as opposed to substantive law, Mississippi's prohibition against direct actions precluded all such actions in Mississippi regardless of place of contracting).

[9] 223 So. 2d 630 (Miss. 1969).

[10] *Id.* at 632.

[11] The *Hodges* court did not address the concern expressed in *Herrin* that admitting evidence that the defendant had insurance might result in an award of damages irrespective of the question of negligence. *See supra* note 5. The *Hodges* court also did not discuss the specific language of the subject insurance policy.

[12] *Hodges*, 223 So. 2d at 634. Mississippi's uninsured motorist statutes did not

insured's right to bring an action directly against an insurance company for uninsured motorist coverage in *Harthcock v. State Farm Mutual Automobile Insurance Co.*[13] Here, the court held that filing suit against the uninsured motorist was not a prerequisite to suit by the insured for coverage under the policy.[14]

B. Current Law Regarding Direct Actions

The Mississippi Supreme Court continues to prohibit direct actions by third party claimants.[15] The court most recently discussed the prohibition in *Westmoreland v. Raper.*[16] There, the plaintiff brought an action against both the insured and the insurer. The trial court granted the insurer's motion for summary judgment, and the plaintiff appealed.[17] The plaintiff, citing Florida case law, asserted that he was a third party beneficiary to the insurance contract and, as such, had a right to pursue the action directly against the defendant insurer.[18] The Mississippi Supreme Court rejected the

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expressly create a cause of action by the insured directly against the insurer. MISS. CODE ANN. §§ 83-11-101 to -111 (1972). The Federal District Court for the Southern District of Mississippi first addressed this question and concluded that the legislature's intent was that the legal liability of a known uninsured motorist to the insured should be determined in an appropriate forum before the insured could bring suit against the insurance company. Logan v. Aetna Cas. & Sur. Co., 309 F. Supp. 402 (S.D. Miss. 1970).

[13] 248 So. 2d 456 (Miss. 1971).

[14] *Id.* at 460; *see* Farned v. Aetna Cas. & Sur. Co., 263 So. 2d 790, 791 (Miss. 1992) (holding that insured under uninsured motorist coverage could bring direct action against insurer without first establishing liability of uninsured motorist, whether known or unknown).

[15] *See* Clark v. City of Pascagoula, 507 So. 2d 70, 77 (Miss. 1987); Joseph v. Tennessee Partners, Inc., 501 So. 2d 371, 376 (Miss. 1987) (holding that Mississippi rule of law prohibits direct actions against liability insurers).

[16] 511 So. 2d 834 (Miss. 1987).

[17] *Westmoreland*, 511 So. 2d at 834.

[18] *See* Shingleton v. Bussey, 211 So. 2d 593 (Fla. Dist. Ct. App. 1968). In *Bussey*, the Florida appellate court held that liability insurance policies should be construed as "quasi-third party beneficiary contracts" which would allow injured third party claimants the right to bring direct actions against liability insurers. *Bussey*, 211 So. 2d at 596. On appeal, the Florida Supreme Court affirmed, "conclud[ing] that a direct cause of action now inures to a third-party beneficiary

plaintiff's contention, noting that the reasoning of the Florida courts had been rejected by the majority of jurisdictions. In declining to follow the Florida courts' reasoning, the court explained that the plaintiff's "theories of recovery run headlong into deeply entrenched and well established laws of this State."[19] The court then restated the familiar rule that, unless and until a judgment has been rendered in favor of the claimant, "a liability insurer may not be sued directly."[20]

Mississippi's federal judiciary has, pursuant to the *Erie* doctrine, followed the state court's prohibition of direct actions. In *Jordan v. State Farm Mutual Automobile Insurance Co.*,[21] the court observed that the Mississippi Supreme Court has "'steadfastly refused' and would continue to refuse to permit a direct action against a liability insurer."[22] Citing *Westmoreland*, the *Jordan* court noted the Mississippi Supreme Court has "specifically rejected the argument that a claim could be asserted by an injured party against another's liability insurer on the basis of a third-party beneficiary theory."[23] In *Cowley v. Texas Snubbing Control, Inc.*,[24] the court again concluded that under Mississippi law, a third party does not have "standing to assert a claim of bad faith against [an insurer] for its handling of his claim for benefits."[25] The court further explained that since an insurer does not owe any duty to a third party unless the terms of the insurance contract confer third party beneficiary status, a direct action on the policy is appropriate only "upon securing a judgment against

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against an insurer in motor vehicle liability insurance coverage cases as a product of the prevailing public policy of Florida." Shingleton v. Bussey, 223 So. 2d 713, 715 (Fla. 1969). In essence, the Florida Supreme Court made injured third party claimants intended third-party beneficiaries (or at least "quasi-intended third-party beneficiaries") who are entitled to enforce liability insurance contracts not actually intended or made for their benefit. *Bussey*, 223 So. 2d at 715.

[19] *Id.*

[20] *Westmoreland*, 511 So. 2d at 885 (citing Cook v. State Farm Mut. Ins. Co., 128 So. 2d 363 (Miss. 1961)).

[21] 774 F. Supp. 424 (S.D. Miss. 1991).

[22] *Jordan*, 774 F. Supp at 426.

[23] *Id.*

[24] 812 F. Supp. 1437 (S.D. Miss. 1992)

[25] *Cowley*, 812 F. Supp. at 1446.

the insured."[26]

III. Third Party Beneficiary Theory

As discussed above, third party claimants may not normally sue insurers directly. They have no standing to enforce the insurance contract entered into between the insurer and insured because such third parties are considered strangers to the insurance contract. Traditionally, third party claimants have been regarded as *incidental* beneficiaries to the insurance contract.[27] However, where specific provisions in the insurance contract are made for the benefit of third parties, the third parties may be deemed *intended* third party beneficiaries with a right to enforce the insurance contract directly. The challenge, then, is for the third party claimant to establish himself as an intended rather than incidental third party beneficiary, thus gaining the right to proceed directly against the insurer.

A. Intended Third Party Beneficiaries

The law regarding third party beneficiaries is relatively consistent throughout the country, and is particularly so in the deep South.[28]

In Mississippi, an intended third party beneficiary may enforce a promise made for his benefit even though he is a stranger to the contract.[29] In order to be considered an intended third party beneficiary, the rights of the third party "must 'spring' from the contract terms."[30] The claimant must

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[26] *Id.* at 1458.

[27] *See, e.g.,* Gianfillippo v. Northland Cas. Co., 861 P.2d 308, 310 (Okla. 1993); Cowley v. Texas Snubbing Control, Inc., 812 F. Supp. 1437, 1445 (S.D. Miss. 1992).

[28] In general, an intended third party beneficiary to a contract is entitled to enforce the terms of the contract incorporated therein for his benefit, and is subject to the defenses arising out of the contract. Levine v. Selective Ins. Co., 462 S.E.2d 81, 84 (Va. 1995).

[29] *See* Mississippi High School Activities Ass'n, Inc. v. Farris, 501 So. 2d 393, 395-96 (Miss. 1987) (holding claimant must be intended rather than incidental beneficiary to enforce contract).

[30] Trammell v. State, 622 So. 2d 1257, 1260 (Miss. 1993) (citing Burns v.

show that the contractual provision allegedly breached was incorporated into the contract for his direct benefit.[31]

The Mississippi Supreme Court has set out the following guidelines for determining whether or not a third party claimant qualifies as an intended third party beneficiary:

> (1) when the terms of the contract are expressly broad enough to include the third party either by name as one of a specified class; and
> (2) the said third party was evidently within the intent of the terms so used, the said third party will be within its benefits; if
> (3) the promisee had, in fact, a substantial and articulate interest in the welfare of the said third party in respect to the subject of the contract.[32]

In Texas, as elsewhere, the presumption is that parties to a contract negotiate and enter into the contracts primarily for their own benefit. However, the Texas courts recognize an exception to this rule giving the third party a right to enforce the contract where he establishes that certain provisions in the contract were made for his benefit.[33] To qualify as an intended

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Washington Savings, 171 So. 2d 322, 325 (Miss. 1965)).

[31] *See* Ivey's Plumbing & Elec. Co. v. Petrochem Maintenance, Inc., 463 F. Supp 543, 549 (N.D. Miss. 1978) (citing Hartford Accident & Indem. Co. v. Hewes, 199 So. 93, 95 (Miss. 1940)).

[32] *Farris*, 501 So. 2d at 396 (quoting Yazoo & M.V.R. Co. v. Sideboard, 133 So. 669, 671 (Miss. 1931)); *see also* United States v. State Farm Mut. Auto. Ins. Co., 936 F.2d 206, 209-10 (5th Cir. 1991); United States *ex rel* Control Sys., Inc. v. Arundel Corp., 896 F.2d 143, 145-46 (5th Cir. 1990); Gerard J.W. Bos & Co. v. Harkins & Co., 883 F.2d 379, 382 (5th Cir. 1989); Bowyer & Johnson Constr. Co. v. White, 255 F.2d 482, 486 (5th Cir. 1958); M.T. Reed Constr. Co. v. Virginia Metal Prod. Corp., 213 F.2d 337, 338-39 (5th Cir. 1954); Burley v. Homeowners Warranty Corp., 773 F. Supp. 844, 860-61 (S.D. Miss. 1990); Litton Sys., Inc. v. Frigitemp Corp., 613 F. Supp. 1377, 1385-86 (S.D. Miss. 1985); Canipe v. National Loss Control Serv. Corp., 566 F. Supp. 521, 528-29 (N.D. Miss. 1983) (applying Tennessee law); Trammell v. State, 622 So. 2d 1257, 1260 (Miss. 1993); Vickers v. First Miss. Nat'l Bank, 458 So. 2d 1055, 1063-64 (Miss. 1984); Engle Acoustic & Tile, Inc. v. Grenfell, 223 So. 2d 613, 620 (Miss. 1969); Burns v. Washington Savings, 171 So. 2d 322, 325 (Miss. 1965); Arnold's of Miss., Inc. v. Clancy, 171 So. 2d 152, 153-54 (Miss. 1965); Hartford Accident & Indem. Co. v. Hewes, 199 So. 93, 95-96 (Miss. 1940); Canada v. Yazoo & M.V.R. Co., 57 So. 913, 913 (Miss. 1912).

[33] *See* Talman Home Fed. Sav. & Loan Ass'n v. American Bankers Ins., 924

third party beneficiary, the third party must clearly establish that the contracting parties intended that the benefit of the contractual provisions at issue inure to him.[34] Once this is established, the intended third party beneficiary takes no greater rights under the contract than those rights of the original contracting parties.[35]

Louisiana follows the general rule that contractual duties are owed only by and to parties to the contract.[36] The exception to this rule, of course, is that an intended third party beneficiary may enforce a contract made for his benefit.[37] There is no requirement that a third party beneficiary be named in the contract,[38] and all beneficiaries of the contract need not be determinable on the date of the contract,[39] but the intent to confer benefits on a third party is necessary to establish a "stipulation *pour autrui*."[40] Under Louisiana law, a stipulation *pour autrui* is valid only if the benefit to the third party is a condition of or consideration to the contract.[41]

F.2d 1347, 1350-51 (5th Cir. 1991).

[34] United States v. Allstate Ins. Co., 910 F.2d 1281, 1284 (5th Cir. 1990).

[35] *See, e.g.,* Alpine Ocean Seismic Survey, Inc. v. F. W. Myers & Co., Inc., 23 F. 3d 946, 947-48 (5th Cir. 1994). *See generally* Resolution Trust Corp. v. Kemp, 951 F.2d 657, 662-63 (5th Cir. 1992); Cedillo v. Standard Oil Co., 291 F.2d 246, 249 (5th Cir. 1961); Camco Oil Corp. v. Vander Laan, 220 F.2d 897, 898-99 (5th Cir. 1955); Sowell v. Northwest Cent. Pipeline Corp., 703 F. Supp. 575, 581-82 (N.D. Tex. 1988); Toyomenka, Inc. v. Toko etc., 342 F. Supp. 292, 294 (S.D. Tex. 1972); Mitsui & Co. v. Toko etc., 342 F. Supp. 14, 17 (S.D. Tex. 1972); Paragon Sales Co., Inc. v. New Hampshire Ins. Co., 774 S.W.2d 659, 660-61 (Tex. 1989); Corpus Christi Bank & Trust v. Smith, 525 S.W.2d 501, 503 (Tex. 1975); Quilter v. Wendland, 403 S.W.2d 335, 335-37 (Tex. 1966); Krueger v. Williams, 359 S.W.2d 48, 51-52 (Tex. 1962); Greenville Indep. Sch. Dist. v. B&J Excavating, Inc., 694 S.W.2d 410, 412 (Tex. Ct. App. 1985); Gonzalez v. City of Mission, 620 S.W.2d 918, 920-21 (Tex. Civ. App. 1981); Vapor Corp. v. Welker, 582 S.W.2d 858, 861-62 (Tex. Ct. App. 1979).

[36] Smith v. State, 620 So. 2d 1172, 1182 (La. Ct. App. 1992).

[37] McKee v. Southfield School, 613 So. 2d 659, 661 (La. Ct. App. 1993).

[38] King v. Employers Nat'l Ins. Co., 928 F.2d 1438, 1442 (5th Cir. 1991).

[39] Dartez v. Dixon, 502 So. 2d 1063, 1066 (La. 1987).

[40] Whitney Nat'l Bank v. Howard Weil Fin. Corp., 631 So. 2d 1308, 1310 (La. Ct. App. 1994).

[41] Logan v. Hollier, 699 F.2d 758, 759 (5th Cir. 1983). *See also* New Orleans Pub. Serv., Inc. v. United Gas Pipeline Co., 732 F.2d 452, 467 (5th Cir. 1984); Wallace v. Texaco, Inc., 681 F.2d 1088, 1090 (5th Cir. 1982); Shockley v. Sallows,

In Tennessee, intended third party beneficiary status arises when parties make a valid contract which contains provisions evidencing a clear intent to operate for the benefit of the third party.[42] If the third party is an intended third party beneficiary under the contract, then the promisee's right to enforce the contract extends to the promise made for the benefit of the third person.[43]

In Alabama, as elsewhere, the key question in determining whether one is a third party beneficiary to a contract is whether the parties to the contract intended to benefit the third party by the contractual provision in question. It is not necessary that the parties expressly identify the third party beneficiary at

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615 F.2d 233. 238 (5th Cir. 1980); A.L. Rowan & Son, Inc. v. Department of Hous. & Urban Dev., 611 F.2d 997, 999-1001 (5th Cir. 1980); United States v. Automobile Club Ins. Co., 522 F.2d 1, 3 (5th Cir. 1975); Saia v. City of Memphis Light, Gas & Water Div., Inc., 508 F. Supp. 206, 210 (W.D. La. 1981); City of Shreveport v. Gulf Oil Corp., 431 F. Supp. 1, 4 (W.D. La. 1975); St. Julien v. Diamond M Drilling, 403 F. Supp. 1256, 1259 (E.D. La. 1975); Merco Mfg., Inc. v. J.P. McMichael Constr. Co., 372 F. Supp. 967, 971 (D. La. 1974); Broussard v. Northcott Exploration Co., 481 So. 2d 125, 127 (La. 1986); Aero Trucking Co. v. Continental Ins. Co., 465 So. 2d 691, 698 (La. 1985); Fontenot v. Marquette Cas. Co., 247 So. 2d 572, 579 (La. 1971); Andrepont v. Acadia Drilling Co., 231 So. 2d 347, 350 (La. 1969); HMC Management Corp. v. New Orleans Basketball Club, 375 So. 2d 700, 708 (La. Ct. App. 1979); Snelling & Snelling v. Delta Data Serv., Inc., 259 So. 2d 446, 449 (La. Ct. App. 1972).

[42] Estate of Wilson v. Arlington Auto Sales, Inc., 743 S.W. 2d 923, 930 (Tenn. Ct. App. 1987).

[43] *See* Davidson & Jones Dev. Co. v. Elmore Dev. Co., Inc., 921 F.2d 1343, 1356-57 (6th Cir. 1991); Edward M. Johnson & Assoc., Inc., 845 F.2d 1395, 1399, 1399 (6th Cir. 1988); Baird Ward Printing Co., Inc. v. Great Recipes Pub. Assoc., 811 F.2d 305, 308 (6th Cir. 1987); Tennessee Valley Authority v. Exxon Nuclear Co., Inc., 753 F.2d 493, 498 (6th Cir. 1985); Speaker v. Cates Co., 879 S.W.2d 811, 816 (Tenn. 1994); Giles County v. First U.S. Corp., 445 S.W.2d 157, 159-60 (Tenn. 1969); National Sur. Corp. v. Fischer Steel Corp., 374 S.W.2d 372, 375 (Tenn. 1964); U.S.F.&G., Co. v. Elam, 278 S.W.2d 693 (Tenn. 1955); Petty v. Sloan, 277 S.W.2d 355, 358 (Tenn. 1955); Moscheo v. Moscheo, 838 S.W.2d 226, 288 (Tenn. Ct. App. 1992); Coburn v. City of Dyersburg, 774 S.W.2d 610 (Tenn. Ct. App. 1989); Moore Constr. Co. v. Clarksville Dept. of Elec., 707 S.W.2d 1, 9 (Tenn. Ct. App. 1985); Dudley v. Unisys Corp., 852 S.W.2d 435, 439 (Tenn. Ct. App. 1992); United American Bank of Memphis v. Gardner, 706 S.W.2d 639, 641 (Tenn. Ct. App. 1985); Air Temperature, Inc. v. Morris, 469 S.W.2d 495, 500 (Tenn. Ct. App. 1970); Insurance Premium Services, Inc. v. Wood, 420 S.W.2d 595, 600 (Tenn. Ct. App. 1967); Peoples Bank v. Baxter, 298 S.W.2d 732, 738 (Tenn. Ct. App. 1957).

the time the contract is made.[44] Once a party is determined to be an intended third party beneficiary, the third party may bring a direct action to enforce the contractual provisions incorporated for his benefit.[45]

Arkansas law does not appear to differ significantly from that of any other southern state with regard to third party beneficiaries.[46]

B. Medical Payment Coverage Provisions Create Intended Third Party Beneficiaries

In order for a third party claimant to an insurance contract to bring a direct action against an insurance company, the claimant need not necessarily be an "insured person" under the policy at issue. For instance, a judgment creditor may, in some circumstances, bring a direct action against an insurer after a judgment has been rendered against either the insurer or the

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[44] Rumford v. Valley Pest Control, Inc., 629 So. 2d 623, 631 (Ala. 1993).

[45] *See* Howard v. Uniroyal, Inc., 719 F.2d 1552, 1555 (11th Cir. 1983). *See also* Beverly v. Macy, 702 F.2d 931, 940 (11th Cir. 1983); Ross v. Imperial Constr. Co., 572 F.2d 518, 521 (5th Cir. 1978); Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784, 787 (5th Cir. 1975); United States Pipe & Foundry Co. v. U.S.F.&G. Co., 505 F.2d 88, 90 (5th Cir. 1974); Airlines Reporting Corp. v. Higginbotham, 643 So. 2d 952, 959 (Ala. 1994); Swann v. Hunter, 630 So. 2d 374, 376 (Ala. 1993); Keebler v. Glenwood Woodyard, Inc., 628 So. 2d 566, 569 (Ala. 1993); State Farm Fire & Cas. Co. v. Green, 624 So. 2d 538, 539 (Ala. 1993); Weathers Auto Glass, Inc. v. Alfa Mut. Ins. Co., 619 So. 2d 1328, 1359 (Ala. 1993); Whitehead v. U.S.A.-One, Inc., 595 So. 2d 867 (Ala. 1992); Colonial Bank of Alabama v. Ridley & Schweigert, 551 So. 2d 390, 395 (Ala. 1989); Smith v. Equifax Serv., Inc., 537 So. 2d 463, 466 (Ala. 1988); Davidson v. Marshall-DeKalb Elec. Co-op., 495 So. 2d 1058, 1060 (Ala. 1986); Mills v. Welk, 470 So. 2d 1226, 1228 (Ala. 1985); Russell v. Birmingham Oxygen Serv., Inc., 408 So. 2d 90, 93 (Ala. 1981); Sly v. South Cent. Bell Tel. Co., 387 So. 2d 137, 139 (Ala. 1980).

[46] *See, e.g.,* Southern Farm Bureau Cas. Co. v. United States, 395 F.2d 176, 179 (8th Cir. 1968); Fidelity & Cas. Co. of New York v. J. A. Jones Constr. Co., 325 F.2d 605, 608 (8th Cir. 1963); Johnson v. Ryder Truck Rentals, Inc., 686 F. Supp 727, 728 (W.D. Ark. 1988); Shamburger v. Moody, 322 F. Supp 196, 213 (D. Ark. 1970); Deason v. Farmers & Merchants Bank of Rogers, 771 S.W.2d 749, 753-54 (Ark. 1989); Hufsmith v. Weaver, 687 S.W.2d 130, 131-32 (Ark. 1985); Howell v. Worth James Constr. Co., 535 S.W.2d 826, 828 (Ark. 1976); Moore v. Moore, 731 S.W.2d 215 (Ark. Ct. App. 1987); Fireman's Fund Ins. Co. v. Rogers, 712 S.W.2d 311, 313 (Ark. Ct. App. 1986); Monaghan v. Davis, 700 S.W.2d 375, 376 (Ark. Ct. App. 1985).

insured in favor of the judgment creditor.[47] The most common example of courts allowing a third party claimant to proceed directly against an insurer occurs when the third party asserts a right to the benefits due under the medical payment provision of an insurance contract. Courts have generally distinguished the rights of general third party claimants from those of medical payment provision claimants. Under medical payment provisions, the insurer's liability for payment to the medical payment claimant is not at all dependent upon the negligence of the insured. Rather, under medical payment provisions, the insurer is considered to be directly liable to the third party claimant.[48]

Many insurance policies, including homeowner's and commercial general liability policies, contain "medical payment provisions." Medical payment provisions usually provide that the benefits are to be paid to the injured person regardless of fault. The language of these medical payment provisions ("med-pay") is relatively uniform. In homeowner's policies, med-pay provisions typically provide as follows:

> Guest Medical Protection
> [The insurer] will pay the reasonable expenses incurred for necessary medical, surgical, x-ray and dental services; ambulance, hospital, licensed nursing and funeral services; and prosthetic devices, eye glasses, hearing aids, and pharmaceuticals. These expenses must be incurred and the services performed within three years from the date of an OCCURRENCE causing BODILY INJURY to which this policy applies, and is covered by this part of the policy.
> Each person who sustains BODILY INJURY is entitled to this protection when that person is:
> 1. on the INSURED PREMISES with the permission of an INSURED PERSON; or

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[47] *See* Cook v. State Farm Mut. Ins. Co., 128 So. 2d 363, 367 (Miss. 1961) (holding that claimant cannot sue liability insurer directly until judgment has been rendered in favor of claimant).

[48] *See, e.g.*, Foundation Reserve Ins. Co. v. Cody, 458 S.W.2d 214, 217 (Tex. App. 1970); Gordon v. New Hampshire Ins. Co., 214 A.2d 533, 537 (N.J. Super. Ct. App. Div. 1965).

2. off the INSURED PREMISES, if the BODILY INJURY:
   (a) arises out of a condition on the INSURED PREMISES or immediately adjoining ways;
   (b) is caused by the activities of an INSURED PERSON or a RESIDENCE EMPLOYEE;
   (c) is caused by an animal owned by or in the care of an INSURED PERSON; or
   (d) is sustained by a RESIDENCE EMPLOYEE.

In the typical automobile insurance policy, most med-pay provisions include something similar to the following:

> We will pay reasonable medical expenses for BODILY INJURY caused by an accident, for services furnished within three years of the date of the accident. These expenses are for necessary medical, surgical, x-ray, dental, ambulance, hospital, professional nursing and funeral services, eye glasses, hearing aids and prosthetic devices.

As stated above, in the context of med-pay provisions, courts across the country have uniformly held that injured med-pay claimants are deemed intended third party beneficiaries.[49] We have found no reported case which holds that a med-pay provision is not intended to create in a claimant, rights as an intended third party beneficiary. The following is said regarding med-pay clauses:

> Standard automobile liability insurance policies generally

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[49] *See, e.g.*, Donald v. Liberty Mut. Ins. Co., 18 F.3d 474, 481 (7th Cir. 1994) (holding med-pay provisions in insurance policies are separate intended third party beneficiary contracts); United States v. Nationwide Mut. Ins. Co., 499 F.2d 1355 (9th Cir. 1974); United States v. United Servs. Auto. Ass'n, No. 90-1425-K, 1991 WL 152793 (D. Kan. July 2, 1991); Maxwell v. Southern Am. Fire Ins. Co., 235 So. 2d 768, 770 (Fla. Dist. Ct. App. 1970) (holding med-pay provision creates intended third party beneficiary who is entitled to bring direct action against insurer); Hunt v. First Ins. Co. of Hawaii, 922 P.2d 976 (Haw. Ct. App. 1996); Beschnett v. Farmers Equitable Ins. Co., 146 N.W.2d 861 (Minn. 1966); Desmond v. American Ins. Co., 768 S.W.2d 144 (Mo. Ct. App. 1990); Roach v. Atlas Life Ins. Co., 769 P.2d 158, 161 (Okla. 1989) (stating med-pay provisions create intended third party beneficiaries to life insurance contracts); Navy v. Lumbermens Mut. Cas. Co., 219 A.2d 396, 398 (R.I. 1966) (holding med-pay clause in insurance policy creates intended third party beneficiary in med-pay claimant).

> contain, for a comparatively small extra premium, provisions by which the insurer undertakes to pay medical and funeral expenses, within specified limits, accidentally incurred by any person while occupying an automobile owned by the insured when that automobile is being used by the insured or a member of his household, or by any other person with the insured's permission. Such provisions further extend medical and funeral expense coverage to the insured, and relatives who are members of his household, as to such expenses incurred by reason of accidental injuries sustained while that person is occupying or is struck by any automobile. Clauses of this type have been said to constitute, in effect, separate accident insurance coverage, and the obligation runs to the injured person, or to the person rightfully incurring the funeral expense, rather than to the person insured against liability, the provisions, as to covered third persons, being in the nature of a third party beneficiary contract. Thus, it has been held that under the medical payments coverage only the injured person has a right to enforce the obligation of the insurer.[50]

Thus, since med-pay claimants are intended third party beneficiaries, they stand in the shoes of the contracting parties and may bring direct actions against insurers. The overriding reason for conferring third party beneficiary status in this situation is the fact that if the injured claimant who is entitled to the benefits is unable to proceed directly against the insurer, then the med-pay provision is essentially unenforceable.

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[50] 7 AM. JUR. 2D *Automobile Insurance* § 287 (1980); *see also* Annotation, Coverage Construction and Effect of Medical Payments and Funeral Expenses Clauses of Liability Policy, 42 A.L.R. 2d 983, 984-85 (1955) (noting insurer's liability for medical and funeral expenses depends upon particular language of contract); *see, e.g.*, United States v. State Farm Mut. Auto. Ins. Co., 936 F.2d 206, 210 (5th Cir. 1991) (holding third party's right to bring action on contract must "spring" from terms of contract); New Hampshire Ins. Co. v. Smith, 357 So. 2d 119, 121 (Miss. 1978) (holding clear and convincing evidence required to establish waiver of contract provisions).

C. *"Bad Faith" Versus Tortious Breach of Contract*

Although the insurer does not owe a fiduciary duty to either a third party claimant or an intended third party beneficiary, an intended third party beneficiary (e.g., a med-pay claimant), unlike a third party claimant, may bring a direct action for punitive damages where he can prove that the insurer tortiously breached the provisions incorporated into the insurance contract for his benefit. Technically, an action for tortious breach of contract by an intended third party beneficiary would not be characterized as a "bad faith" action. A bad faith action must be predicated upon the insurer's breach of the duty of good faith and fair dealing.[51] In order to prevail in a "bad faith" action, the plaintiff must first show that a fiduciary duty ran from the defendant to the plaintiff and that the defendant breached this duty.[52] It is almost axiomatic to say that the duty to act in good faith inures only to the insured, and not to third parties.[53] Therefore, it is questionable whether there is a fiduciary duty running from the insurer to a third party med-pay claimant on which to base an action for punitive damages.[54] It would appear the relationship between the third party

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[51] *See* Cowley v. Texas Snubbing Control, Inc., 812 F. Supp. 1437, 1446 (S.D. Miss. 1992) (holding insurer owes duty of good faith and fair dealing only to insureds and intended beneficiaries).

[52] 15A GEORGE J. COUCH, COUCH CYCLOPEDIA OF INSURANCE LAW § 58:3 (2d ed. 1983); *see, e.g.*, Kranzush v. Badger State Mut. Cas. Co., 307 N.W.2d 256, 265 (Wis. 1981) (stating that "an insurer owes no duty to third-party claimant to settle or to negotiate in good faith").

[53] *See Kranzush*, 307 N.W.2d at 263 (providing "'duty of good faith and fair dealing' runs only to an insurance company's insured"); *see also* Seguros Tepeyac, S.A., Compania Mexicana v. Bostrom, 347 F.2d 168 (5th Cir. 1965); Chavez v. Chenoweth, 553 P.2d 703 (N.M. Ct. App. 1976); Becker v. Allstate Ins. Co., 678 S.W.2d 561, 561 (Tex. Ct. App. 1984); Bruheim v. Little, 295 N.W.2d 793, 794-95 (Wis. Ct. App. 1980).

[54] *See* Uebelacker v. Horace Mann Ins. Co., 500 F. Supp. 180, 184 (E.D. Wis. 1980) (finding third party had no special relationship with insurer and, accordingly, no fiduciary duty existed); Fobes v. Blue Cross & Blue Shield, 861 P.2d 692, 694 (Ariz. Ct. App. 1993); Coleman v. Gulf Ins. Group, 718 P.2d 77, 83-84 (Cal. 1986); Murphy v. Allstate Ins. Co., 553 P.2d 584, 587 (Cal. 1976); Cromer v. Setton, 471 N.E.2d 700, 703 (Ind. Ct. App. 1984); Watson v. Allstate Ins. Co., 828 S.W.2d 423, 426 (Tex. Ct. App. 1991); Pixton v. State Farm Mut. Auto Ins. Co., 809 P.2d 746, 749 (Utah Ct. App. 1991); *cf.* Davidson v. State Farm Fire & Cas.

beneficiary and the insurer is not fiduciary and, therefore, the third party beneficiary cannot be awarded punitive damages on a bad faith theory of recovery.[55]

Given the legal underpinnings of bad faith actions, the right of a third party beneficiary to bring a bad faith action would not seem logical. The tort of bad faith has evolved into and been generally limited to two distinct scenarios: first, where the insurer has breached its obligations to the injured insured to exercise good faith in the settlement of a claim ("excess liability" actions);[56] and second, where an insurer improperly denies or handles an insured's claim ("first party" actions).[57]

In excess liability actions, the insurer's duty stems from the promise to protect the insured from exposure to liability up to the agreed upon limits. In first party actions, the insured is entitled to relief from the insurer because he has entered into contractual relations with the insurer and has paid premiums for exactly the benefits he is now being denied. Finally, in both scenarios, it is the breach of duty owed to the insured, not the existence of any duty to a third party, which is the crux of insurer liability.[58]

Co., 641 F. Supp. 503, 513-14 (N.D. Miss. 1986) (holding that duty of good faith and fair dealing does not arise out of first-party insurance contract); Gorman v. Southeastern Fidelity Ins. Co., 621 F. Supp. 33, 38 (S.D. Miss. 1985). *But cf.* Roach v. Atlas Life Ins. Co., 769 P.2d 158, 161-62 (Okla. 1989) (recognizing that duty of good faith and fair dealing extends to insured, as well as third parties).

[55] *See* Benefit Trust Life Ins. Co. v. Union Nat'l Bank, 776 F.2d 1174, 1177 (3d Cir. 1985) (holding relationship between third party and insurer solely a matter of contract); *Coleman*, 718 P.2d at 84; *Watson*, 828 S.W.2d at 426; 45 C.J.S. *Insurance* § 376 (1993). Similarly, the duty of good faith and fair dealing does not extend from the insurer to a judgment creditor whose rights in the proceeds, like the third-party beneficiary's, have vested. Been v. Allstate Ins. Co., 403 A.2d 793, 795-96 (Md. 1979). Thus while the judgment creditor can sue for the contractual limits to which he is entitled, he cannot bring a bad faith action against the insurer based in tort. *See* Fidelity & Cas. Co. v. Cope, 462 So. 2d 459, 459 (Fla. 1985); Ammerman v. Farmers Ins. Exchange, 430 P.2d 576, 577 (Utah 1967). To bring such an action in tort, the judgment creditor must first obtain an assignment of the excess claim from the insured. *See* COUCH, *supra* note 52, § 58:4.

[56] *Kranzush*, 307 N.W. 2d at 259.

[57] *Id.*

[58] *See generally* Fidelity and Cas. Co. v. Cope, 462 So. 2d 459 (Fla. 1985).

Nevertheless, the fact that a med-pay claimant should not be allowed to pursue punitive damages from the insurer based on a "bad faith" theory of recovery is a mere semantic, meaningless source of comfort, because this does not insulate the insurer from exposure to an award of punitive damages. Under Mississippi law, a party may bring a claim for punitive damages where the insurer's refusal or delay in paying med-pay benefits is willful, intentional, or grossly negligent. Mississippi cases allowing punitive damages for tortious breach of contract are legion.[59] Notably, in none of these cases is there a requirement that there be a fiduciary relationship between the parties. The only requirements are that the defendant owes the plaintiff a contractual duty, and the defendant's breach of that contractual duty rise to the level of independent tort.[60] Therefore, if the insurer owes a third party beneficiary the duty to pay med-pay benefits, it is certainly arguable that the insurer should it not be allowed by its conduct to willfully, intentionally or grossly negligently fail to fulfill its contractual obligations. After all, the insurer accepted the risk when it charged the insured a premium for the med-pay coverage (even though

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[59] *See, e.g.,* Prudential Property Cas. Co. v. Mohrman, 828 F. Supp. 432 (S.D. Miss. 1993); Cabell Elec. Co. v. Pacific Ins. Co., 655 F. Supp. 625 (S.D. Miss. 1987); Butler v. Provident Life & Accident Ins. Co., 617 F. Supp. 724 (S.D. Miss. 1985); Mixon v. Provident Life & Accident Ins. Co., 616 F. Supp. 139 (S.D. Miss. 1985); State Farm Auto. Mut. Ins. Co. v. Universal Underwriters Ins. Co., 601 F. Supp. 286 (S.D. Miss. 1984); Horton v. Hartford Life Ins. Co., 570 F. Supp. 1120 (N.D. Miss. 1983); Sessoms v. Allstate Ins. Co., 634 So. 2d 516 (Miss. 1993); Eselin-Bullock & Assoc. Ins. Agency v. National Gen. Ins. Co., 604 So. 2d 232 (Miss. 1992); Blue Cross & Blue Shield, Inc. v. Maas, 516 So. 2d 495 (Miss. 1987); Aetna Cas. & Sur. Co. v. Doleac Elec. Co., 471 So. 2d 325 (Miss. 1985); Consolidated Am. Life Ins. Co. v. Toche, 410 So. 2d 1303 (Miss. 1982); Gulf Guar. Life Ins. Co. v. Kelley, 389 So. 2d. 920 (Miss. 1980); Aetna Cas. & Sur. Co. v. Steele, 373 So. 2d 797 (Miss. 1979); Bellefonte Ins. Co. v. Griffin, 358 So. 2d 387 (Miss. 1978); Lincoln Nat'l Life Ins. Co. v. Crews, 341 So. 2d 1321 (Miss. 1977); Progressive Ins. Co. v. Keys, 317 So. 2d 396 (Miss. 1975).

[60] Weems v. American Sec. Ins. Co., 461 So. 2d 1222 (Miss. 1986) (holding that bad faith refusal claim is independent tort); *see also* 17A AM. JUR. 2D *Contracts* § 732 (1991) (stating "[w]here a contract between two parties is intended for the benefit of a third party, the latter may maintain an action in contract for its breach or in tort if he has been injured as a result of negligent performance.").

normally incorporated into the liability premium). Concomitant with accepting the premium, the insurer is obligated to extend coverage to any qualifying claimant.

D. Punitive Damage Ratio Issue

The fact that med-pay provision claimants may seek punitive damages in direct actions against insurers seldom satisfies the claimant once litigation has commenced. This is because med-pay provisions are typically small in amount (usually $500.00 to $1,000.00), and the trend among the courts appears to be that, where a plaintiff has suffered only economic injury, the amount of punitive damages available to that plaintiff is restricted to a relatively small ratio between actual damages and punitive damages.

On May 20, 1996, the United States Supreme Court handed down the case of *BMW v. Gore*,[61] which may have a significant impact upon punitive awards throughout the country. In *BMW*, the court set out three factors for courts to consider when reviewing punitive damage awards: (1) the reprehensibility of the tortfeasor's conduct; (2) the ratio of compensatory damages to punitive damages; and (3) the comparison of the punitive damage award to any civil or criminal penalty available.[62]

Perhaps the most significant factor is the second: the limitation of the ratio between the punitive award to the amount of actual damages.[63] In *BMW*, the court reviewed a punitive award where the ratio was 500 to 1, and commented that "the award must surely raise a suspicious judicial eyebrow." Although reversing the lower court, the court recognized that, in some cases, a high ratio may be justified where, for example, particularly egregious conduct has resulted in only small eco-

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[61] ___ U.S. ___, 116 S. Ct. 1589 (1996).

[62] *BMW*, 116 S. Ct. at 1598.

[63] For a discussion of the limits on punitive damages in *BMW v. Gore*, *see generally* Marcy L. Bryan, Note, *Constitutional Law—United States Supreme Court Places Limits on Punitive Damages*, 66 Miss. L.J. 235 (1996).

nomic damages.[64] In another recent and significant case, *Continental Trend Resources, Inc. v. OXY USA, Inc.*,[65] the Tenth Circuit Court of Appeals, addressing the ratio issue, held that, in economic injury cases, the ratio between punitive damages and compensatory damages should not exceed ten to one.[66]

The Mississippi Supreme Court has been inconsistent when considering the ratio issue.[67] Because of the possibility that punitive damages may be limited to some reasonable ratio when compared to actual damages, it is not surprising that claimants have begun to explore ways of bringing additional direct claims against insurers in an effort to increase their actual damages. One way in which claimants have done so successfully is through the use of agency theories. Claimants simply allege that a contract exists between the claimant and the insurance company based upon the conduct and representations/promises of the insurer's agent or adjuster. Not only can an insurer be contractually bound by its agents and adjusters, but, in some circumstances, an insurer will be held vicariously liable for its agents' or adjusters' tortious conduct. This is of particular importance where the claimant asserts a tortious breach of contract claim seeking to impute the agents' or adjusters' tortious breach to the insurer.

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[64] *BMW*, 116 S. Ct. at 1598.

[65] 101 F.3d 634 (10th Cir. 1996).

[66] *Continental Trend Resources, Inc.*, 101 F.3d at 639 (citing *BMW*, 116 S. Ct. at 1602). However, the *Continental Trend Resources, Inc.* court also noted, "'[a] higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine.'" *Id.* (quoting *BMW*, 116 S. Ct. at 1602).

[67] *Compare* Dixie Ins. Co. v. Mooneyhan, 1996 WL 97535 (Miss. 1996) (reversing and remanding where punitive award 1,875 times actual damages) *and* Mutual Life Ins. v. Estate of Wesson, 517 So. 2d 521 (Miss. 1987) (reducing punitive award where punitive award was 92 times actual damages), *with* Independent Life & Accident Ins. Co. v. Peavy, 528 So. 2d 1112 (Miss. 1988) (affirming where punitive award was $250,000 but actual damages amounted only to $412.20).

IV. AGENCY AND ADJUSTERS

A. Agency

One relatively common scenario is for the claimant to allege that an adjuster caused an enforceable contract to be formed between himself and the insurer by, for instance, promising that the claimant's medical bills would be paid. The question then becomes whether the agents' or adjusters' actions or words are sufficient to bind the insurer. Also, where it is alleged that the agent or adjuster tortiously breached the contract which that agent caused to be formed, whether the insurer will be vicariously liable for its agents' or adjusters' tortious breach is of critical importance.

Should the court determine that an adjuster is an independent contractor, then the insurer will not be held liable for the actions of that adjuster and the insurer will not be bound by any promises made by the adjuster.[68] The Mississippi Supreme Court has explained that "[n]o vicarious liability for acts of an independent contractor exists in Mississippi."[69] The issue of whether the adjuster is an agent of the insurer or merely an independent contractor is therefore of obvious significance.[70]

An independent contractor is one who contracts with another to perform a task for him but who is not controlled by the other, nor subject to the other's right of control with respect to his physical conduct in the performance of the undertaking.[71] In *Kisner v. Jackson*,[72] the Mississippi Supreme Court set out the following test to determine what is meant by the term "independent contractor":

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[68] Mississippi Power & Light Co. v. Walters, 158 So. 2d 2, 26 (Miss. 1963); *see also* Blackmon v. Payne, 510 So. 2d 483, 488 (Miss. 1987).

[69] Young v. Tennessee River Pulp and Paper Co., 640 F. Supp. 1162, 1167 (N.D. Miss. 1986) (citations omitted).

[70] For purposes of respondeat superior, there are two situations in which an injured third party may seek to hold the principal vicariously liable: (1) principal and agent, and (2) master and servant. Richardson v. APAC-Mississippi, Inc., 631 So. 2d 143, 147 (Miss. 1994).

[71] RESTATEMENT (SECOND) OF AGENCY § 2 (1958).

[72] 132 So. 90 (Miss. 1931).

> [W]hether the principal master has the power to terminate the contract at will; whether he has the power to fix the price in payment for the work, or vitally controls the manner and time of payment; whether he furnishes the means and appliances for the work; whether he has control of the premises; whether he furnishes the materials upon which the work is done and receives the output thereof, the contractor dealing with no other person in respect to the output; whether he has the right to prescribe and furnish the details of the kind and character of work to be done; whether he has the right to supervise and inspect the work during the course of the employment; whether he has the right to direct the details of the manner in which the work is to be done; whether he has the right to employ and discharge the subemployees and to fix their compensation; and whether he is obliged to pay the wages of said employees.[73]

Even where it has been determined that the adjuster or agent is an independent contractor, this status can be transformed where "third parties are adversely affected, [because the court] will carefully scrutinize the contract [between the parties] to see if public policy should permit the transformation. . . . "[74] Also, the status may be transformed from that of independent contractor to agent where the principal "assumes control or direction of the method of performing the work."[75]

However, whatever the outcome of the above analysis, in Mississippi the status of an agent in the insurance context is controlled by section 83-17-1 of the Mississippi Code.[76] This section "creates agency relationships where they would not exist at common law."[77] The stated purpose of section 83-17-1 is to prevent insurers from avoiding legal liability by operating through third persons for whom they later deny all responsibil-

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[73] *Kisner*, 132 So. at 91; *see also* RESTATEMENT (SECOND) OF AGENCY § 220(2)(a)-(j) (1958).

[74] *Richardson*, 631 So. 2d at 150.

[75] Mississippi Power and Light Co. v. Walters, 158 So. 2d 2, 26 (Miss. 1963); Southern Natural Gas Co. v. Wilson, 304 F.2d 253, 262 (5th Cir. 1962).

[76] MISS. CODE ANN. § 83-17-1 (1972).

[77] State v. Richardson, 817 F.2d 1203, 1207 (5th Cir. 1987).

ity.[78] The purpose of this statute is, however, not to fix the scope of authority of insurance agents, but rather to fix their status as "agents."[79]

For instance, in *Dearman v. Prudential Insurance Co.*,[80] the court, interpreting section 83-17-1, held that an employer who collected premiums from its insured employees and forwarded the premiums to the insurer became the insurer's agent under the literal wording of the statute.[81] Similarly, in *State v. Richardson*,[82] an insurance agency which dealt only with an insurance wholesaler rather than directly with the insurer was determined by the court to be the insurer's "agent" pursuant to section 83-17-1.

The statute itself provides, in relevant part:

> Every person who solicits insurance on behalf of any insurance company, or who takes or transmits . . . an application for insurance or a policy of insurance . . . or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk . . . , or who shall examine into or adjust or aid in adjusting any loss for or on behalf of any such insurance company, whether any of such acts shall be done at the instance or request or by the employment of the insurance company, or of or by any broker or other person, shall be held to be the agent of the company for which the act is done or the risk is taken as to all the duties and liabilities imposed by law, whatever conditions or stipulations may be contained in the policy or contract . . . .[83]

Accordingly, notwithstanding the fact that any contract between the parties may purport to create an independent contractor relationship, it is clear that section 83-17-1 will usually render adjusters and otherwise independent agents, "agents" of the insurer.

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[78] Saucier v. Life & Cas. Ins. Co., 198 So. 625, 627-28 (Miss. 1940) (construing predecessor statute to section 83-17-1).

[79] Mitchell v. AETNA Cas. & Sur. Co., 579 F.2d 342, 349 n.5 (5th Cir. 1978).

[80] 727 F.2d 479 (5th Cir. 1984).

[81] *Dearman*, 727 F.2d at 480.

[82] 817 F.2d 1203 (5th Cir. 1987).

[83] MISS. CODE ANN. § 83-17-1 (1972).

It has long been established that the general law of agency applies to insurers' relationships with their agents.[84] Under agency law, the principal is bound by the actions of his agent where the agent is acting within the scope of the agent's actual or apparent authority.[85] Where an agent has apparent authority to bind his principal, then the issue of actual authority need not be reached.[86]

In order to recover on the basis of apparent authority, the plaintiff must meet a three-pronged test: "(1) acts or conduct on the part of the principal indicating the agent's authority, (2) reasonable reliance on those acts, and (3) a detrimental change in position as a result of such reliance."[87] All three elements must be present in order to create apparent authority.[88] The principal will be bound by the actions of his agent if the principal's conduct is such that "persons of reasonable prudence, ordinarily familiar with business practices, dealing with the agent might rightfully believe the agent to have the power he assumes to have."[89]

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[84] Germania Life Ins. Co. v. Bouldin, 56 So. 609, 613 (Miss. 1911).

[85] Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172, 1180 (Miss. 1990).

[86] Baxter Porter & Sons Well Servicing Co. v. Venture Oil Corp., 488 So. 2d 793, 796 (Miss. 1986).

[87] *Andrew Jackson Life Ins. Co.*, 566 So. 2d at 1181.

[88] Steen v. Andrews, 78 So. 2d 881, 883 (Miss. 1955).

[89] *Steen*, 78 So. 2d at 883. In *Barhonovich v. American Nat'l Ins. Co.*, the insured purchased a life insurance policy from American National which required the insured to pay a monthly premium of $45.52 "For life." Barhonovich v. American Nat'l Ins. Co., 947 F.2d 775, 776 (5th Cir. 1991). After the policy had been in effect for 15 years, American National's agent began to divert the premiums paid by the insured and therefore did not credit the insured's premiums to his policy, causing the policy to lapse. American National was unaware of the insurance agent's scheme. After engaging in the scheme for two years, the insurance agent told the insured that the cash value accumulated in the insured's account was sufficient to service all future monthly premium payments and therefore no more payments were required. *Barhonovich*, 947 F.2d at 776.

Three years later, the insured asked another of American National's agents about the cash value of his policy and was told that the policy had lapsed for nonpayment of premiums. Subsequently, American National offered to return all of the insured's premiums that he had paid, or to reinstate the insured's policy and credit it with all of the premiums he had paid but which had been diverted by the insurance agent. The insured rejected American National's offers. *Id.* at

777.

The insured sued American National, maintaining that he did not have to comply with the terms of the policy as it was written because American National was bound by the actions of its agent which terminated any obligation to pay monthly premiums. The court first noted that American National would be bound by the actions of its agent committed within the scope of the agent's actual or apparent authority. The court stated that American National did not grant its agent the authority to conduct his fraudulent activities. *Id.* at 777-78.

The court next turned to the issue of whether American National would be bound by the unauthorized actions of its agent under the theory of apparent authority. After reciting the three elements which are required for apparent authority to exist, *supra*, the court held that none of the three elements were present in the case. First, the court noted that American National did not make any representation to its insured which would have allowed the insured to stop making monthly payments. Second, because the policy itself expressly required monthly payments to be made "for life," the court stated that the insured's reliance upon the insurance agent's misrepresentations was not reasonable under the circumstances. Finally, the court held that the insured did not detrimentally change his position in reliance on the insurance agent's authority. The court stated that the insured was not harmed by his failure to pay the premiums, none of the insurance agent's statements caused the insured to be financially unable to pay the monthly premiums, nor did the insured prove that he would have continued to pay in the premiums or cancel the policy and purchase one elsewhere. *Id.* at 778.

The insured further contended that American National breached its contract with him because its agent did not credit his account and allowed his policy to lapse. However, the court held, that

> this contract could not be breached until [the insured's] heirs submit a claim and American National improperly denies it or until American National refuses to credit premiums paid. Neither circumstance has occurred. American National has never disputed that [the insured] is entitled to receive credit for premiums he paid to [the agent].

Id. at 779. Therefore, the court held that American National had not breached its contract with its insured.

Finally, the insured sought punitive damages based on the insurance agent's misrepresentations. The court, in denying the insured's contention that he was entitled to punitive damages, held:

> [The insurance agent's] misrepresentations cannot be the basis for awarding punitive damages against American National. American National did not authorize [its agent] to modify the contract. American National has not denied a claim under the contract. American National has not breached the contract. The record shows no negligence, much less gross negligence, on the part of American National. [The insurance agent's] acts cannot be imputed to American National. American National did not ratify, encourage, or authorize [its agent's] actions.

Id.

In Mississippi, there are two ways in which the principal can be found vicariously liable even for the torts of his agent.[90] First, Restatement Second of Agency § 219 (1) provides that a principal is vicariously liable for the torts of his agent which are committed while the agent is acting within the scope of his employment. The agent's conduct is in the scope of his employment only if "(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master."[91] Furthermore, subsection (2) of section 219 lists four situations in which conduct that fails to satisfy the

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In the case of *American Casualty Co. v. Whitehead*, the insurance agent continued to collect premium payments from the insured after the agent's actual authority to represent the insurer had been terminated. American Cas. Co. v. Whitehead, 206 So. 2d 838, 838 (Miss. 1968). The facts set out in the *Whitehead* decision do not indicate what the insurance agent did with the premiums he collected from the insured, but it is clear that he did not forward the premiums on to the insurer. After the agent had begun to divert the monthly payments for his own use, the insured was injured in an accident and sought to collect under his policy. The insured was never notified by the insurance company or by the agent that his policy had lapsed prior to the time that he made the demand under the policy. Also, the insured was never notified that the insurance company had terminated the agent's authority to administer insurance policy on its behalf. *American Cas. Co.*, 206 So. 2d at 838-40.

The first issue was whether the agent had authority to bind the insurance company due to the fact that the insurance company had terminated its relationship with the agency a full year before the insured was injured. The court held that while the agent did not have actual authority to collect premiums on its behalf, it did have apparent authority to do so. The court held that the three essential elements to establish apparent authority were met in this case. *Id.* at 843; *compare* Ford v. Lamar Life Ins. Co., 513 So. 2d 880 (Miss. 1987) (holding that apparent authority was not present where insured died day after agent erroneously informed him that he was covered by insurance policy at issue).

The second issue was whether the policy had expired prior to the time that the insured was injured, because of the failure of the agent to transmit the monthly premium payments to the insurer. The court, citing Germania Life Ins. Co. v. Bouldin, stated: "The principal need not authorize the agent to practice a fraud on third parties, yet if he authorize his agent to transact the business with a third party, and in doing so the agent practices the fraud on the party, the principal is liable." *American Cas. Co.*, 206 So. 2d at 842 (citing Germania Life Ins. Co. v. Bouldin, 56 So. 609, 613 (Miss. 1911). Therefore, the court held that the insurer was liable for the insured's claims arising out of his injuries.

[90] Entente Mineral Co. v. Parker, 956 F.2d 524, 526 (5th Cir. 1992).

[91] RESTATEMENT (SECOND) OF AGENCY, § 219(1) (1958).

"within the scope of employment" test found in section 228 may yet provide a basis for imposing vicarious liability. Subsection (2) provides, in relevant part:

> A master is not subject to liability for the torts of his servants acting outside the scope of employment, unless: . . . (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.[92]

Therefore, the principal will be liable for the torts of his agent if the agent commits the tort while either acting in the scope of his employment as defined by section 228, or if section 219 (2) applies.[93]

Second, section 261 assesses vicarious liability against the principal even if the agent's conduct was not actuated by a purpose to serve the principal. Section 261 provides, "[a] principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud."[94] Comment (a) to section 261 provides that the principal will be held liable under the rule stated in section 261 even though he is entirely innocent and has received no benefit from the transaction.[95]

For example, in *Entente Mineral Co.*, two parties entered into a verbal agreement whereby the purchaser agreed to buy a royalty interest from the seller. Subsequently, the seller hired an attorney to prepare the necessary documents to effectuate the sale. However, the attorney seized upon the opportunity to purchase the royalty interest from the seller for a slightly higher price than that offered by the buyer. Thereafter, the disgruntled purchaser brought an action against the attorney and the attorney's law firm alleging vicarious liability on the part of the

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[92] *Entente Mineral Co.*, 956 F.2d at 526-27 (quoting RESTATEMENT (SECOND) OF AGENCY § 228 (1958)).

[93] *Id.* at 527.

[94] *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 261 (1958)).

[95] *Id.*

firm.

Applying the principles mentioned above, the court held that the law firm was not vicariously liable for its attorney's tortious conduct under the first test because the attorney purchased the royalty interest for himself and was acting in his own interest, and not in the interest of the law firm. Therefore, the attorney's actions did not satisfy the section 228 definition of "within the scope of employment," because the attorney's conduct must have been motivated at least in part by a desire to serve the law firm.

Turning to the second test, the court held that the proper inquiry for determining vicarious liability of a principal whose agent defrauds the principal's customer is the relationship between the principal and the customer. The court noted that, in this case, the law firm did not have a relationship with the customer whom the attorney had defrauded. Because there was no relationship between the firm and the defrauded customer that could be imputed to the firm's agent, the court held that the premise underlying section 219(2)(d) and section 261 liability, a relationship between the principal and an innocent third party, was absent in the case.

In *Billups Petroleum Co. v. Hardin's Bakeries Corp.*,[96] a cafe brought an action to recover overcharges for bread delivered by a bakery goods salesman who, over a period of time, had charged the cafe for greater amounts of bread than were actually delivered. The court held that the bakery goods salesman was an agent of the bread company and that the bread company, as principal, was liable to the cafe for injuries resulting from the salesman's or agent's fraud and deceit. The court stated:

> It is well settled that the principal is liable for the frauds and misrepresentation of his agent within the scope of the authority or employment of the agent, even though he has no knowledge thereof and has received no benefit therefrom. The principal is liable to third persons for injuries resulting from the

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[96] 63 So. 2d 543 (Miss. 1953).

> fraud and deceit of his agent if such is within the scope of the agent's authority. Acts of fraud by the agent, committed in the course or scope of his employment, are binding on the principal, even though the principal did not know of or authorize the commission of the fraudulent acts, and although he derives no benefit from the success of the fraud, and the agent committed it for his own benefit.[97]

Even if an insurer is found not to be vicariously liable under the tests set out above, if the insurer retains the agent or adjuster after learning of his or her tortious activities, the issue exists as to whether the insurer may be nonetheless vicariously liable because of "ratification." The Mississippi Supreme Court has defined ratification as "the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him."[98] However, in *Western Union Telegraph Co. v. Rogers*,[99] the court held that "[m]ere negation or absence of action, as by retention of the servant, is not a ratification."[100] The master must have taken some affirmative action to be held liable by virtue of ratification of his servant's tortious conduct.[101] The rule is that the master's mere retention of the servant who has engaged in tortious conduct will not constitute ratification of the servant's conduct, as long as the servant was acting outside the scope and course of his employment when he committed the tortious acts.[102] However, if the servant was acting within the course and scope of his employment when he committed the tortious action and the master thereafter retains the servant as an employee, then this retention may constitute ratifica-

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[97] *Billups Petroleum Co.*, 63 So. 2d at 546 (citations omitted); *see also* Napp v. Liberty Nat'l Life Ins. Co., 159 So. 2d 164 (Miss. 1963).

[98] *See* Gulf Ref. Co. v. Travis, 30 So. 2d 398, 399-400 (Miss. 1947).

[99] 161 So. 131 (Miss. 1935).

[100] *Western Union*, 161 So. 2d at 132.

[101] *Id.*

[102] *See* Wells v. Robinson Bros. Motor Co., 121 So. 141, 142 (Miss. 1929); Kraft v. Magnolia Stores Co., 138 So. 405, 407 (Miss. 1931).

tion.[103]

It has generally been held that there can be no ratification of an act which could not have been legally done by the principal himself in the first instance, or which could not have been legally delegated to an agent to perform.[104] It has further been held that, as a general rule, acts of fraud by an agent committed in the course or scope of his employment are not binding on the principal where punitive damages are involved.[105] For instance, in *Banker's Life Insurance Co. v. Scurlock Oil Co.*,[106] the court held that when the tortious action of the agent would have consequences imputing evil intent to the principal such that punitive consequences would result to the principal, then, if the agent's actions were not authorized by the principal, committed without the principal's knowledge, and provided no benefit to the principal, the principal should not be held responsible.[107] The court stated:

> The distinction we make here is a well-established one — drawn between suits which seek to impute an agent's fraud or guilty intentions to his principal, and suits which seek to allocate that loss resulting from an agent's fraud between the principal and innocent third parties. Two considerations operate to create the distinction. The first is whether the action seeks to impute any evil intent to the principal in a way that would result in punitive consequences to the principal. When the action would have such consequences, then clearly, if the actions of the agent were unauthorized, committed without the principal's knowledge and for no benefit to the principal, the principal should not be held liable. The type of cases in which we find this rule applied are usually criminal cases, or cases having some punitive consequences. In most civil cases, however, where no punitive consequences are involved, the principal is held liable for the fraudulent misrepresentations of his agent, even though the agent acted without authority

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[103] Pullman Co. v. Alexander, 78 So. 293, 293-94 (Miss. 1918).
[104] 2A C.J.S. *Agency* § 68 (1992).
[105] *See* 3 C.J.S. *Agency* § 427. (1992)
[106] 447 F.2d 997 (5th Cir. 1971).
[107] *Banker's Life Ins. Co.*, 447 F.2d at 1005 n.12.

> and without any intent to benefit his principal, so long as the third person reasonably believed the agent was acting within the scope of his authority. It is in these cases that the second consideration comes into play. And that consideration is to protect innocent third parties, or perhaps more accurately, to prevent principals from benefiting at the expense of innocent third parties.[108]

Notwithstanding the above general rule, in Mississippi, it is well-settled that an insurer can be held liable for punitive damages for its agent's actions.[109]

B. Attacking the Agency End-Around

Because of the nature of adjusting a claim, the claimant may contend that the adjuster promised to pay all of the claimant's medical bills. This is more likely to occur where the liability of the insured tortfeasor is clear and the adjuster is relatively certain that the claimant's medical bills will not exceed the applicable liability limits of the policy.

However, an alleged promise to pay "all" of a claimant's medical bills is probably too indefinite to constitute an enforceable contract. In *Southern Pine Superior Stud Corp. v. Herring*,[110] the plaintiffs alleged that an adjuster promised them that the insurance company would pay for repairing their vehicle, for the rental of a substitute car while their vehicle was being repaired, for the cost of transporting the vehicle to be repaired, and for "all other expenses incurred by the plaintiffs."[111] The plaintiffs further alleged that they "relied on the promises of defendants' agent to pay the aforesaid costs and expenses, but defendants declined to offer to pay but about half of the amount thereof."[112] The Mississippi Supreme Court

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[108] *Id.* at 1005 (citations omitted).

[109] *See* Nichols v. Shelter Life Ins. Co., 923 F.2d 1158 (5th Cir. 1991); Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172 (Miss. 1990); Independent Life & Accident Ins. Co. v. Peavy, 528 So. 2d 1112 (Miss. 1988).

[110] 207 So. 2d 632 (Miss. 1968).

[111] *Id.* at 633.

[112] *Id.*

held:

> [T]he judgment [for the plaintiffs] must be reversed [because] there was no contract on which an action could be based . . . . An enforceable executory accord may arise where a completed agreement is made to adjust a claim. But in order to be enforceable an executory contract to settle an unliquidated claim should be certain, full and complete in itself so as to preclude all future controversy. The all-embracing promise to take care of all expenses in the future was too indefinite to be enforceable as a contract. Such an agreement invited controversy in the future and was too indefinite to be enforceable, even if we assume the other formalities necessary to a binding contract existed. The most important part of the contract was the amount to be paid. This was left undetermined . . . .[113]

In *Leach v. Tingle*,[114] the court held:

> In ascertaining whether a contract is sufficiently definite to be enforceable, . . . essential or core terms may not be judicially added. . . . [P]rice is an essential term. It must be stated with specificity. Where it is not provided, the contract fails.[115]

Whether an alleged promise constitutes an enforceable contract is a question of law for the court to decide. In *Leach v. Tingle*,[116] the court stated:

> [T]here are formalities [which] parties must meet before their

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[113] *Id.* at 634; *see also* Union Oil Co. v. Wood, 297 So. 2d 819, 820 (Miss. 1974) (holding that agreement which failed to specify price was too indefinite to constitute enforceable contract).

[114] 586 So. 2d 799 (Miss. 1991).

[115] *Leach*, 586 So. 2d at 802-03; *see also* Massengill v. Guardian Management Co., 19 F.3d 196, 202 (5th Cir. 1994) ("If any essential term is left unresolved, there is simply no contract and no obligation on the parties."); Duke v. Whatley, 580 So. 2d 1267, 1274 (Miss. 1991) (same); First Money, Inc. v. Frisby, 369 So. 2d 746, 751 (Miss. 1979) ("An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performance to be rendered by each party are reasonably certain.").

[116] 586 So. 2d 799 (Miss. 1991).

> bargain may become legally enforceable . . . . [O]ne of those formalities is that the contract must be reasonably complete and its essential terms reasonably certain. Questions of the validity, enforceability and construction of contracts—of whether the parties have satisfied the law's formal requisites—are committed to the court as distinguished from the trier of facts.[117]

It should be noted, however, that the case which can be relied upon by an insured, *Southern Pine Superior Stud Corp. v. Herring*,[118] might actually support the claimant's contention that a binding contract exists. In *Southern Pine*, the Mississippi Supreme Court expressly held that the plaintiff could sue for breach of contract based on the adjuster's statement. Specifically, the court stated: "[t]he insurance company, represented by the adjuster, was negotiating this settlement of Herring's tort claim against Southern Pine and Mid South. An enforceable executory accord may arise where a completed agreement is made to adjust a claim."[119] While the court held that the promise to "take care of all expenses in the future" was too indefinite, the court noted that the amount of the repair bill was not "undetermined."[120] The court thus suggested that the repair bill amount would have been recoverable, but for the court's alternate holding that the insurance adjuster lacked authority to bind the tortfeasor-defendant. This would be problematic should the adjuster, at the time he made the promise to pay "all" the claimant's medical bills, actually have some of the medical bills in hand. In that case, while the insurer would not be liable for payment of "all the medical bills," a binding contract would probably be formed as to payment of those medical bills which the adjuster possessed at the time of the promise, assuming the other contract prerequisites are not

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[117] *Id.* at 801; *see also* Bank of Shaw v. Posey, 573 So. 2d 1355, 1358 (Miss. 1990) (granting motion for summary judgment on breach of contract claim because terms "were so vague and uncertain as to be unenforceable").

[118] 207 So. 2d 632 (Miss. 1968).

[119] *Herring*, 207 So. 2d at 633.

[120] *Id.*

lacking.

If the plaintiff's alleged oral contract clears the indefiniteness hurdle, the alleged oral contract may still fail based upon a lack of consideration. It should be remembered that "[n]o cause of action arises from a bare promise."[121] The problem of consideration may be overcome by asserting that the claimant agreed "cooperate" with the insurer. In order to establish sufficient consideration plaintiffs have argued that their cooperation with the insurer's investigation and evaluation of the claim is sufficient. However, if "cooperation" simply means that the claimant agreed to forward all of his medical bills to the insurer, this would probably constitute no consideration at all.

The plaintiff may also assert that he forbore from filing suit in reliance upon the adjuster's promise to pay all medical bills. In this situation, the alleged oral agreement in such a case will be unenforceable if the claimants' alleged forbearance was not definite and certain at the time of contracting. In *Garnett v. Kirkman*,[122] the court stated:

> If [the contract] was entered into, in order to be valid in law, it was necessary that it should be definite and certain as to the terms of forbearance, for otherwise it was without consideration to the Defendant. When we look to the evidence, the inquiry immediately arises, what were the terms of the contract? What was the period of forbearance? Was it a mere gratuitous indulgence, or was the forbearance a legal right which [the promisor] could have enforced? All these things are essential in order to create a liability in consideration of forbearance. . . . [123]

Forbearance from suit is not sufficient consideration where no definite time of forbearance is fixed.[124] "Forbearance to sue, to constitute legal consideration, must be such as will tie the [promisor's] hands for a definite time established by the parties."[125]

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[121] DAVID S. SHRAGER ET AL., THE QUOTABLE LAWYER, § 32.3, at 61 (1986).

[122] 33 Miss. 389, 404 (1857).

[123] *Garnett*, 33 Miss. at 404-05.

[124] 17A AM. JUR. 2D *Contracts* § 158 (1991); 17 C.J.S. *Contracts* § 103 (1963).

[125] Bank of Lexington v. Jack Adams Aircraft Sales, Inc., 416 F. Supp. 17, 21

Where the time of forbearance is not certain, the insurer's right to compel the claimant to forbear is probably as illusory and unenforceable as the claimants' alleged right to force the insurer to pay the claimant's medical bills, because the insurer cannot compel adherence to a contract which does not exist. The insurer in such a situation has no legally enforceable right to compel such forbearance. If the claimant's agreement to forbear was not limited in time, then neither can the insurer's right to compel such forbearance be limited. Moreover, "a promise to forbear becomes ineffective as a consideration if plaintiff . . . does not waive [his right to sue], and in fact files [suit] within the statutory period."[126] If the claimant in the case at issue does not waive his right to sue as evidenced by the fact that he has in fact filed suit within the statutory period, then the claimant will have, in effect, forfeited nothing.

V. CONCLUSION

The Mississippi Supreme Court has not specifically addressed whether a med-pay claimant is an intended third party beneficiary with the accompanying right to proceed directly against the insurer. Along with this question, the court will ultimately have to address whether the med-pay claimant may seek punitive damages under traditional bad faith theories and/or based upon tortious breach of contract. In deciding these unsettled issues, the court must be cognizant of the need to provide the med-pay claimant with a method of enforcing the med-pay provision while avoiding the creation of new actions for "bad faith" not heretofore recognized under common law or statute.

(N.D. Miss. 1976).

[126] 17 C.J.S. *Contracts* § 103 (1963).

EFFECTIVE APPELLATE ADVOCACY: TIPS FROM THE TEAMS

Ronald J. Rychlak[*]

The 1996-97 school year marked my tenth year at the University of Mississippi and my tenth coaching moot court teams for the law school. During this time, it has been my great pleasure to be associated with many very dedicated students who worked hard to represent the University of Mississippi at competitions throughout the nation. I have often coached more than one team per year. Along the way, I have probably learned more than I have taught.

Over the years, we have had our share of successes. For example, two of our teams advanced through regional competitions to the national finals. Although we did not win the overall national championship, both teams won all of their oral rounds at the national level. In addition, one student was honored as the top advocate in the United States, not to mention that we have been recognized with many individual and team awards and honors at the regional competitions.

Each year many lawyers and judges from around Mississippi, and particularly in the Oxford area, volunteer to serve as judges in our practice rounds.[1] Their critiques are always very helpful to our team. In addition, judges at the competitions we attend typically give very good advice at the conclusion of each round.[2]

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[1] Jackson law firms, Heidelberg & Woodliff and Currie, Johnson, Griffin, Gaines & Myers, each sponsor an oral advocacy team from the University of Mississippi at annual competitions.

[2] After graduation from law school, I had the good fortune to serve as a judicial clerk to the Honorable Harry W. Wellford of the United States Sixth

As I reflect back over these past ten years, it occurs to me that the tips, wisdom, and advice that I have picked up while coaching these teams might be of benefit to those in the profession. Accordingly, I have jotted down notes about our teams' experiences and the skills that we have tried to develop since I began coaching moot court teams. I hope that these pointers will be of some benefit to those engaged in the actual day-to-day practice of law.

THE IMPORTANCE OF ORAL ARGUMENT

When Justice Clarence Thomas visited the University of Mississippi School of Law in 1995, someone asked him why he did not often pose questions from the bench during oral argument. His response was that he read the briefs and did his own research before the argument so that he knew how he felt about the issue by the time oral argument began. He explained that he was neither a teacher, nor was he trying to "test" the lawyers involved in the case. As such, he rarely felt it necessary to ask questions from the bench; however, he did acknowledge that there were times when he heard something at oral argument that might influence his vote. Therefore, while he saw oral argument as having a limited role in the decision-making process, he felt it was important to have oral arguments to allow judges an opportunity to resolve any lingering questions.

Many appellate court judges seem to agree with Justice Thomas in that most cases are won or lost based upon the law and the arguments that are set forth in the briefs. Although a practicing attorney has little choice in deciding the law or establishing the facts, a well-written brief, like a well-tried case, can have some impact on the ultimate outcome of a dispute. However, attorneys must work with the law and the

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Circuit Court of Appeals. Judge Wellford not only permitted his clerks to attend oral arguments, he was very willing to talk with them about the case and the argument. He has also served as a judge, both for practice rounds and for the competition when the University of Mississippi hosted it. As such, I owe him a great deal of thanks for his insights into this process.

facts as they exist. An oral argument is probably even one step further removed than the law and facts in terms of the attorney's ability to affect the ultimate outcome. Nevertheless, it is important enough that every attorney must give serious attention to, and spend a great deal of time preparing for, the oral argument.

As an advocate, the job of an attorney is to present the case in a manner most favorable to the client. Although a very persuasive oral advocate cannot guarantee victory to a client, any attorney with good advocacy skills can assure a client of the best representation possible.

It has been written of baseball managers that the best ones win the games they are supposed to win and occasionally win ones they are supposed to lose. In other words, a manager's role may be limited, but it may make the difference between finishing in first place and finishing in second. As professionals, attorneys strive to do the very best they can, each and every time, with the situation they are given. This is a duty owed not only to the client, but also a duty owed to the profession, which is the reason advocacy skills are so important. Recognizably, many seemingly insignificant matters can have a great deal of impact on the professionalism of an argument. An attorney's professionalism, in turn, may influence the ultimate resolution of the case.

I once lost an argument before the Seventh Circuit Court of Appeals to an attorney who did little more than look down and read his brief during the presentation of his case - even in response to questions from the panel. The best argument in the world probably would not have won that appeal for my client. Nevertheless, when it was over, I knew that I had given my client a professional effort at representation. Sometimes such an effort can make the difference, which is the reason conscientious attorneys continually work on their advocacy skills.

THE PROCESS OF THE ARGUMENT

Introductory Matters

Most attorneys are quite familiar with the process of stepping up to the podium, announcing "may it please the court," and proceeding into the argument. Most also know to structure an argument with an introduction, a middle, and a conclusion. Good attorneys will be very familiar with the law and the facts, know the standard of review, and have a summary conclusion prepared.[3] Along the way, however, there are numerous details to consider. These small details, taken together, can make a tremendous difference in your professionalism.

I normally ask my team members to begin their opening by saying: "May it please the court, my name is _____ and I am here on behalf of _____." The petitioner should then, as a matter of courtesy to the court, if not required by local rules, note whether any time has been reserved for rebuttal. This may not seem terribly important, but the judges may be keeping track of time and may decide whether to ask one final question based upon their perception of how much allotted time is left. If a judge is unaware that you have reserved time for a rebuttal, the judge might inadvertently leave you with too little time to answer the last question and conclude your argument. Mentioning the rebuttal, even when not required, can therefore be an important factor in assuring your argument comes off smoothly.

After this brief introduction, the next logical step in the argument relates to a statement of the facts. Since you can assume the judges have read the briefs, it is important not to waste all of your time reciting them in great detail. I have, in fact, seen advocates request permission of the court to dis-

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[3] Always Shepardize your cases. One of the most interesting cases I ever saw argued was a U.S. Sixth Circuit case in which both attorneys were arguing about the application of a case that had been overturned. When Judge Wellford finally asked one of the attorneys (who happened to be representing himself) whether he knew that the case was no longer good law, he responded (with great composure): "No, your honor, but I would point out that opposing counsel didn't know it either."

pense with a recitation of the facts. This strikes me as a bad idea.

Appellate court judges often hear five or more cases in any given day. While they are familiar with the cases, it may take them a moment or two to recall the specific facts of your case. As such, the recitation of the facts serves to jog their memory and focus them on your case. More importantly, a careful recitation of the facts can help frame your issues in a light that will be more favorable to your client.

When orally stating the facts, as with writing the facts in the brief, it is proper to emphasize those facts that are particularly favorable to your client while at the same time trying to minimize any negative facts. This must be undertaken with great caution. You do not want the other side (or one of the judges from the bench) to accuse you of misleading the court. Nevertheless, with careful preparation, you should be able to very subtly slant the facts in your favor. Carefully done, this can be a persuasive tool, not just an introductory matter. It is well worth spending some time working out the details so that you will be able to present the facts in this manner.

While it is proper to try to present the case in the light most favorable to your client, there are some difficult decisions relating to the more adverse facts. You may be able to blunt the effect these facts will have by bringing them out yourself. In fact, if you do not disclose such facts, you will almost certainly be accused of trying to hide them, and even if you are not so accused, some judges may think that is the case. Thus, it is unwise to slant the facts so severely that you are left open to a charge of trying to deceive the court.

If you are able to prepare a favorable recitation of the facts,[4] the next difficulty may be obtaining permission from the court to present the facts. Judges often tell a attorney to skip over the facts and get directly to the meat of the argument. When so asked, it is important to forgo the facts and get

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[4] By prepare, I do not mean memorize or write out a script to be read in court. Instead become very familiar with the facts and be able to present them. A memorized or "canned" presentation will not impress the court.

into the argument. If, however, you can use the facts in a persuasive manner, do not skip over them. Thus, I always encourage members of my teams to introduce the facts by letting the court know the recitation will be very brief.

I suggest the team members say something like, "the facts of this case can be summed up in four sentences." Few courts would deny you the time to state four sentences. However, once you make that promise, you had better stick carefully to the four sentence limitation. Alternatively, you might begin your recitation by assuring the court that "the facts of this case can be summed up quite briefly." In either case, be sure that you do in fact keep the recitation brief. The last thing you want to do is lose credibility or bore the court at the beginning of the argument. However, if you can effectively use the recitation of facts in a persuasive manner, you may start to convince a wavering judge to lean in your favor before you even really begin the argument.

Once stated, the facts usually lead directly into the issue in the case. Here too, proper phrasing can help you get an early start on the argument. Take a look at the issues presented in good appellate briefs; the attorneys usually state issues in ways that favor their client. This can also be done at oral argument. Thus, you might say, "the issue in this case is whether the State Police have the unilateral right to pull over a car and order the driver—a mother of four—to submit to a frisk in front of her children, even though there was no probable cause." Of course, opposing counsel might claim the issue is, "whether a police officer, who notices a speeding vehicle that matches the description of a car recently involved in a hit-and-run accident, can order the driver out of the car and—upon noticing the suspect appears to have a weapon—conduct a pat-down for the officer's safety." Even though these two issues could come from the same case, they certainly cast the light in different directions.

The issue often logically leads into a brief mention of the standard of review. Remember, on appeal the court is judging not your client, but a holding from the court below. How that holding is evaluated can range from a *de novo* standard, which

gives no weight to the lower court, to a clearly erroneous standard, which gives great deference to the lower court. Between these extremes, there are other standards (*e.g.*, the substantial evidence standard or the arbitrary and capricious standard). You need to know the standard of review (judges may well ask about it), and if it is in your favor, be sure to tell the court about it. Again, this can be a very persuasive part of your argument. Just remind the court how hard (or easy) it is to reverse the court below.

After this, you should be ready to delve into your argument. Do not simply reiterate what is in your brief. You want to *persuade* the judges to adopt your position. Make sure the issues are carefully ordered, with the most important issues first. Sometimes you will get a "hot bench"—judges who are ready to ask questions. If they take off on the first issue, you may never get to the second. Thus, it is important to get to your best arguments quickly. You must be prepared to give a presentation with no questions or to spend all your time doing nothing but answering questions. Such is the joy of appellate advocacy.

Body Language

Even before introductory matters are out of the way, in fact, before saying a single word, consider your communication with the court. Body language is one of the most important parts of a presentation, yet it is easily overlooked. Hand gestures, facial expressions, and body posture all effect the persuasiveness of your argument. Spend some time studying the messages that your expressions send out.

Many people have bad habits of which they are unaware. Someone who is helping you practice an argument can point out any distracting mannerisms that you might have, but nothing works as well as actually seeing yourself give an argument. Fortunately, the affordability of videotape technology has made this very easy for today's attorneys.

It is not necessary to hire a production team or professional video camera operator to get what you need. It is, however, important to set up a video camera and conduct a practice,

with live judges, so you can observe your mannerisms. Practicing alone in a room may help, but it will not show your reactions to questions and interaction with a panel. I once had a team member who cocked his head whenever he was asked a question. Telling him about this for several weeks did no good. The first time that he saw himself on camera, however, he immediately recognized the problem and was able to correct it quickly thereafter.

Another common problem at the podium is swaying back and forth. I personally have a tendency to do this. Recently one of our teams participated in an International Environmental Law Moot Court Competition at Stetson University. This team did quite well, winning awards for both their written presentation and for their advocacy skills. While at Stetson I was introduced to "the Stetson Stance." The Moot Court people at that law school teach students to approach the podium, spread their legs further apart than their shoulders, and grasp the podium to center themselves. It actually looks a little awkward from behind, but from the bench it looks quite natural, and it prevents the speaker from swaying. With a little experimentation at a podium you should be able to find a stance which will minimize any tendency you may have to sway.

It is important for me to point out I have not encouraged all of my team members to adopt the so-called Stetson Stance.[5] This technique is very helpful for persons with the tendency to sway, but if you do not have this tendency, the stance may feel awkward and uncomfortable, and it might negatively affect your performance. It is entirely possible that the disadvantages outweigh the benefits. Accordingly, like many tips you will see here and elsewhere, this technique should be viewed as a solution to a particular problem and not as a general rule to be applied in every case.

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[5] Along the way, one hears many pieces of advice which need to be taken with a grain of salt. An adjunct professor at Fordham teaches his students to rub antiperspirant on the top of their fists. This can then be wiped across their brow to prevent perspiration during the argument. The same professor encourages his male students to carry their dress pants in from home and change into them just before the arguments, to help keep the creases sharp.

Advocates must also concentrate on hand gestures. I once had a team member who flapped his hands in the air so much that we joked about the possibility of him flying away. On the other hand, some advocates squeeze the podium so tightly that they risk cutting off the circulation to their hands. Neither of these approaches is optimal.

Effective hand gestures can add greatly to a presentation, but when they are overdone or done incorrectly, they are even worse than having no hand gestures. It is important to discover your natural tendencies so you can increase, decrease, or change the gestures, as needed. Generally, hand movements should be kept at the chest level or below. Hands should not be raised above the shoulders and you must avoid pointing at the bench. When counting, it is appropriate to keep track on one hand, but keep the hand low and be particularly careful not to appear as if you are pointing at the bench. If you look at most national politicians, you will see that they follow rules similar to these. Hands are rarely elevated, they never point, and they do not overuse their hands. They do, however, make occasional gestures to emphasize particularly important points. This is precisely what you must do to be an effective advocate.

If you have a tendency to overuse your hands, it is a good idea to grasp the podium as soon as you step up to it. In some courthouses you can actually feel indentations in the podium from years of attorneys grasping it tightly. If you concentrate on grabbing the podium when you start, you will find that it is easy to occasionally lift your hands for important gestures. If, however, you start with your hands free, it will be harder to remember to put them down. The rule is the same as for a second baseman: Start low; it is easier to come up than to move down.

If the problem is not using your hands at all, work on a few gestures that always go with a certain part of the argument. Thus, you might practice always gesturing with your left hand when you run down the elements the plaintiff was required to establish in the court below. If you work on a few specific moves, and practice them the same way you practice

the rest of your argument, the whole process will become easier, and you should find hand gestures will become more natural than they have been in the past.

Eye-contact is, of course, very important in any speaker's presentation. Make yourself look people in the eye. With a panel of three or more judges, you have to shift your attention from one judge to the next. Occasionally you may find yourself locked into contact with only one judge, because that judge is the only one looking back. It is fine to direct the majority of your attention toward this judge, but be sure to look over at the other judges now and then. They may have decided to look up and may be waiting to catch your eye. The judge who is looking at you will not feel slighted, because the judge knows that others might be looking up. Be sure, however, to stay focused on any judge who asks you a question, until that judge is satisfied with your answer.

While on the subject of body language, it is important to remember you send off signals even when you are not arguing. Act in a professional manner. Pay attention to opposing counsel,[6] and jot down any notes that you think may be helpful. Do not, however, exhibit exaggerated facial expressions or feign indifference. Even if some attorneys occasionally try tricks like this at trial, appellate judges recognize phoniness and do not like it. All you are likely to do is alienate and anger the judges you are trying to persuade.

The Voice

In addition to working on body language, an effective oral advocate must concentrate on vocal quality. The most frequently encountered mistake is getting excited and speaking too quickly. I sometimes think University of Mississippi teams do well in competitions because many of our students tend to

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[6] Listening to the other argument is crucial for purposes of rebuttal, but it can be very important in more subtle ways. If you can pick up on concessions, matters that concern the judges, or weak legal arguments, you may be able to make last minute adjustments that will better focus your argument and greatly help your case.

speak a bit slower than students from other parts of the country. Even in the South, however, when people get excited there is a natural tendency to speak too quickly. Be aware of this and concentrate on slowing down. This is another area where videotape practice can help.

Closely associated with the problem of speaking too fast is the problem of being monotone. Good speakers vary tempo as well as the volume of their voice. On our teams we sometimes joke about "going Dragnet." If you have ever seen the old Jack Webb television show, you know what I mean. Get a tape recorder and listen to your inflections. You can even get books with drills to help improve this skill.[7] Try to keep the listener interested in what you are saying.

Using Notes

One decision to make is whether to use notes. In competitions, judges often seem to give credit to teams who do not use notes, so our teams usually work without notes. In real courts, I would be nervous about going up to the podium without at least a list of cases and their holdings. As someone once told me, if an attorney is working without notes, the client should be concerned the attorney has spent too much time preparing for the argument.

One of the most effective ways to do this is with note cards that are arranged so that you can quickly flip to a given case and see what you need to remind you of the logic and the holding of that given case. It is also a good idea to make an abstract or index to the record. This will help you to quickly find a statement you want to point out to the court. An added benefit is that the preparation forces you to study the record in some detail.

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[7] The drills are usually fairly simple. They present sentences and suggest different ways to emphasize the words. One such drill, which I remember from my high-school French teacher, involves the sentence: "She is going with him." The drill was to get different meanings simply by emphasizing different words. Subtle use of drills like this develop talents which can elevate advocacy skills dramatically. *Seinfeld* fans may remember a similar phrase: "These pretzels are making me thirsty."

An outline on note cards can remind you of something you have already addressed so you don't go back over it again. Be careful, however, that your notes do not become a crutch that interferes with your argument. If that is the case, consider going without notes, simply to improve your argument.

Bad Speaking Habits

Many people have bad habits when it comes to language. Some people begin every sentence with the word "now." Others insert "you know" whenever they take a break in their speaking. Still others interrupt their speech with constant sounds which are impossible to spell. If you have one of these habits, you may well have seen it in a transcript of a deposition or other proceeding. Sometimes, however, court reporters will leave out these verbal habits, so it is a good idea to either videotape or tape record your presentation in order to alert yourself of any bad habits. A similar, though even more unprofessional habit, is the use of profanity or improper grammar.

If you have any of the above mentioned verbal habits, work on eliminating them from your language not only when in court, but also in your everyday routine. These habits are hard to break and are hard to control if they are part of a regular speaking pattern. Try to make a fair assessment of your habits, check transcripts if you have any, and work on developing a more professional style of speaking.

There are some word choices which are particularly important in the course of an oral argument. Many attorneys not only say, but even write in their briefs, phrases such as: "We urge," "Plaintiff contends," or "I think." When these phrases introduce an argument, they diminish the impact. It is far better to say, "post-sentence review constitutes double jeopardy," than to say, "petitioner contends that post sentencing review constitutes double jeopardy." In one case you are making an affirmative statement; in the other you are diminishing the statement, essentially saying, "here is one opinion." This is a hard habit to break, because the use of these introductory phrases is one way to soften your statement. Attorneys nor-

mally like to do this, as it relieves them of some responsibility. However, when you are trying to persuade a court of your position, this is precisely the wrong thing to do. Accordingly, try to drop these phrases from your argument and be sure to edit them out of your briefs.

There are a few other quick hints I would suggest relating to general language skills. One is to know the proper pronunciation of words. As simple as this may seem, there are probably many case names, names of judges, and even subjects involved in litigation you have seen in print, but have never heard properly pronounced.[8] I am always reminded of one of my team members stating, quite loudly, that Justice Scalia had written on a particular point. The only problem was he pronounced Scalia as "Skale-ya."

There are two others phrases that our Moot Court teams concentrate on. One relates to the statement of the issue. Probably because of a Civil Procedure teacher that I had in law school, who demanded that the issue be stated in a very precise way, I always teach students to use the word "whether," instead of the phrase "whether or not." My professor always said that "whether" encompassed "or not," and as such the "or not" is redundant. Another word which gives some students problems is the word "regardless". In casual language, many people use the word "irregardless," but as most grade school English teachers will tell you, "regardless" is a word and "irrespective" is a word, but "irregardless" is not. Again, the easiest way to avoid making mistakes in the course of an argument is to purge it from your daily language.

The Theme

The heart of any oral argument is the persuasive case you make to the court. The traditional rule is to tell the court what you are about to explain, explain it, and then tell the court what you have just explained. That is a bit simplistic,

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[8] One interesting matter attorneys may want to investigate is the local pronunciation of *voir dire*. I have heard three different pronunciations in different areas of the county.

but easy to remember. What you really want to do is establish a theme, then drive it home. As you construct an argument, focus on a one-sentence summary that you want to "drive home." Then ask yourself how each part of your argument works towards this end. An argument without a theme leaves the court confused and makes you appear unprepared. A theme, however, ties it all together.

With regard to the concept of stating something three times, this is not necessary in order to establish a theme. In fact, I always caution our students against using phrases, "as I have previously explained," or "as I said earlier." When an advocate says those words, the court is alerted that the following is a waste of the court's time. It may be appropriate to tell the court what you are about to tell it, then tell the court, then remind the court what you just told it, but you have to do it subtly so as to avoid the appearance of being redundant.

Answering Questions

Probably the most important skill for an advocate during an oral argument is the ability to answer questions posed by the court. If you have prepared fifteen or thirty minutes of a presentation, you would probably like to go straight down your outline. Unfortunately, the judges rarely want to listen to the presentation in the order that you have established. More often, there are specific questions they need to have answered. As an advocate, you must allow the court to ask those questions, and you must give answers to those questions. This usually means leaving your outline behind. Ideally, you will be able to weave back into your planned outline, but do not force it.

Remember, most judges see a relatively limited role for the oral argument. The most important part for them is to have their questions answered. If you do not answer their questions, you have wasted the most important part of the argument. To be certain you are able to answer the questions, you must carefully listen to the question. Too often attorneys begin to respond to something other than the judge's question. This will not influence a judge who is looking for an answer to

a specific point of concern, so listen carefully each time. If it is necessary to have a question repeated, ask for that or for clarification, but make sure to answer the question.

The questions asked at oral argument are often difficult, otherwise the judges would not be asking them, so there may be a tendency to try to evade or re-phrase the question. Unfortunately, when the judge wants the question answered, evasion, even if successful, will probably come at the expense your case. Moreover, a persistent judge will not let you go too easily.

Sometimes attorneys, when hit with a hard question, go into a great deal of reasoning before giving an answer. This usually sounds evasive, even when it is not intended to be. Therefore, I usually advise team members to go ahead and give the hard answer to the question. They can then go into their argument as to why the question was irrelevant, or why the answer does not harm their case, or why the answer is not what the judge expected it to be, but first give the answer.

It is also important to make certain the judge is satisfied with the answer. Most judges will give some sort indication when they are satisfied. They will nod their heads, sit back in their chairs, or look back down at their papers. If the judge is still looking up, and appears to be unsatisfied, you probably need to go into greater detail. Attorneys are always anxious to get back to their outlined argument, but if the judge wants more on a specific question, it will hurt your case to leave the judge unsatisfied.

Sometimes the hard answers come about because there is unfavorable law in your jurisdiction. You must acknowledge this unfavorable law. You should know that it is out there before your argument, so go ahead and acknowledge it to the court—they almost certainly already know it. You may then delve into your argument as to why that law should be changed. The same is true with regard to bad facts that may exist in your case. Be careful when the court asks you to concede a specific point. A concession at oral argument may be the way for a judge to establish the final link in a difficult analysis. Thus, the judges may have concluded where they

want to go, but need to get over a legal or factual hurdle to get there. A concession at oral argument is a fairly easy way for a judge to accomplish this. As a judge at a competition once explained to our team: "you make a concession at oral argument, then you read that the concession was important to the judge's holding against your client, then you call your malpractice provider, because you are in trouble." There are some things you must concede, but they should be undertaken very cautiously.[9]

Time Management

It is important to manage the time for your argument. If there are three main points that you would like to get out in the course of the allotted time, and the judges ask many questions in the first few minutes of the argument, you will probably have to reduce the time you spend on the first issue, or you will never reach the third issue. The most important thing, of course, is to make sure you address the issues the judges want addressed. However, if it is very important you get to a third issue, keep an eye on the clock and make sure there is enough time to address the issue before oral argument is over.

Scheduling Practice Arguments

Probably the best way to polish your argument is to conduct several mock arguments. Invite attorneys from your firm, people you know, and maybe students from a local law school[10] to listen to your argument. The biggest problem with this is getting your "judges" sufficiently knowledgeable to be effective at the practice. To this end, I always have team members prepare short "bench briefs," which lay out the facts, issues, the legal arguments, and particularly important au-

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[9] A concession on a tough issue makes it easier for the judge to write the opinion, so a judge may try to push a point to get a concession.

[10] This is very beneficial for the students, and they may offer a helpful pointer or two.

thority in about five pages. It may be difficult to trim some cases down this far, but the mere preparation of such a brief is a good exercise for an attorney who has to argue the case in a relatively short period of time. Bench briefs are superior to the appellate briefs in some cases, because people are more likely to read them. The bench brief should be more neutral than the briefs actually filed in the real proceeding,[11] which will help your mock judges prepare questions to ask. By providing the mock-judges with these bench briefs, it is easier for them to become prepared, it is far less burdensome on the judges—and therefore easier to get them to agree to help—and you improve the quality of your presentation.

Avoid Jury Arguments

In making an oral argument, always remember, you are addressing judges on points of law, not appealing to the sympathy of jurors. This means that your argument will be different. Typically, it will be more logical and less emotional, though emotion need not be entirely abandoned. Just be sure to keep the argument focused on the legal issues being appealed not vague concepts of justice or liberty, and this problem should take care of itself.

A related issue is the use of demonstrative exhibits at the argument. I am a strong advocate of such exhibits at trial,[12] but at an appellate argument, they are almost always a bad idea. Use of such exhibits comes too close to confusing the role of the trial court and the appellate court. If a trial exhibit is particularly important, be sure to include it in the record, perhaps right in the brief itself. You will then be able to refer to it and let the judges follow along in their briefs.[13] This is

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[11] If anything, err on the side of the opposing argument. There is no benefit to practices if the judges do not know what the hard arguments are.

[12] *See* RONALD J. RYCHLAK, DEMONSTRATIVE EVIDENCE: APPLICATIONS AND THEORY (The Michie Co. 1995 & Supp. 1997).

[13] If there is a risk that this will be confusing, have a larger exhibit ready. Begin by referring to the brief, then offer to pull out the larger exhibit if the judges so desire. This way you respect the role of the appellate court, but still are able to offer the judges an easy-to-follow visual aid.

usually preferable to pulling out a chart and making an argument that would be more appropriately made to a jury.[14]

Rebuttal

A well done rebuttal is one of the most effective parts of any argument. Unfortunately, too many attorneys do not know how to present an effective rebuttal. A rebuttal is not a opportunity to reargue the case. Rebuttal is your chance to stand up to the court and say, "Your Honors, I have five quick points I would like to address from my opponent's argument." Then answer any questions that your opponent was unable to answer, correct any misstatements of law or fact made by your opponent, and correct any misapprehension on the part of the bench.

Attorneys often allocate too much of their arguing time to rebuttal. It should be done simply and quickly. Make your points and sit down. If the judges have any questions, they are free to ask, but your attitude should be that you are here to set the record straight as to a couple of matters. Do not reargue the case. Such an approach is a very inefficient use of this important time.

Rebuttal time is given to the Petitioner for two reasons. First, it is because the Petitioner has the burden of proof. Whether at trial or on appeal, the party with the burden of proof usually has the procedural advantage of going first and last.[15] The second reason for allocating time for the Petitioner is to assure each side gets to comment after the other has presented its case. Be sure to take advantage of this. Know your opponent's arguments and listen when your opponent is talking and being questioned. Follow up with this on your rebuttal. Address points that your opponent could not answer

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[14] There are times when exhibits can be used to explain legal arguments, as opposed to the more typical use of them to explain facts. Of course, even when used to explain legal concepts judges might resent the introduction of exhibits into the appellate courtroom.

[15] *See* Ronald J. Rychlak & Joseph F. Rychlak, *Problems of Burdens and Bias: A Response To Bornstein*, 12 J. OF MIND & BEHAV. 469 (1991) (discussing burdens of proof and order of argument).

adequately for the judges; follow up with arguments the judges were making from the bench and be sure to point out any misstatements of law or fact by your opponent. This way, rebuttal can be a very persuasive weapon in your arsenal.

Respondents are usually thought not to have rebuttal, but they do. The respondent's rebuttal works just like the petitioner's rebuttal, but it should come at the beginning of his or her argument. Thus, respondents should approach the podium, introduce themselves and state the issue. Then, before delving into the argument the respondent should say, "Your Honors, before I begin my argument, I would like to address a few points that were brought up during the petitioner's argument." At this point, go directly into the rebuttal as laid out above. This is a very effective and persuasive way to begin an argument.

Closing the Argument

Often closings are rushed and not quite what the attorney had hoped for. A good closing, however is a very effective way to leave the court thinking well of your case. Obviously, then, time management is very important to the closing.

If you are aware that time is running short, it may be possible to alert the court to that fact, but this must be done carefully. It makes little sense to take a judge away from a point in which the court is interested so that you can add a comment on an argument that the judges have already dismissed. It may be better simply to cut your argument short by 30 to 60 seconds if necessary to make your conclusion.

In the conclusion, you might want to point out or briefly touch on any arguments time has not allowed you to make, and always remember to close your argument by making a plea. Thus, at the close of your argument, you should take fifteen seconds to sum up and conclude by saying, "For the foregoing reasons, Petitioner respectfully requests that this court reverse the judgment of the court below and remand the case for further proceeding," or similar appropriate language.

Outside Distractions

There are occasional distractions during an argument. I always thought the worst one I had seen was when a marshal gave a guided tour of the Fifth Circuit courtroom during an argument. However, we later had an oral argument in Memphis interrupted by a fire alarm. Because it was a competition, the judges decided to pick up precisely where we had left off, in the middle of the argument. The next time you have a minor distraction, keep these interruptions in mind and count your blessings.

Go Do It

All of the writing in the world cannot help someone become a better advocate—that takes practice. This is a skill which can be honed and improved, but it takes effort. If you have time, contact a local law school and volunteer to serve as a judge. This will let you see what works and where others have problems. Ultimately, however, you need to do it yourself. Everyone fears "baptism under fire," but by agreeing to handle appellate cases—taking *pro bono* work is one way—and using the techniques set forth above, anyone can become a good oral advocate. The key, of course, as with all skills, is practice. Hard work, practice, and these "tips from the teams," will help you improve your skills and better serve your clients of the future.

COMMENTS

CALLING THE BLUFF: EXPLORING ANONYMITY AS A MEANS TO A COLORBLIND ELECTORAL SYSTEM

A strong tension currently exists in the voting rights arena in the debate on the role of race in the election process. The source of this tension stems primarily from two diametrically opposed views on the issue: one advocates that race be a consideration while the other insists that it should not—the former arguing the significance of "race consciousness"[1] in the goal towards political equality, and the latter portraying the injection of race into the voting process as intrinsically antithetical to political fairness. One of the clearest examples of this dichotomy arises when the implications of Section 2, as amended, and Section 5 of the Voting Rights Act[2] confront the concept of a "colorblind" society.[3] Because Section 2 expressly

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[1] See Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 761-63 (1990) for various interpretations of the notion of "race consciousness" as determined by one's position and perspective in society. For purposes of this comment, the term refers to that "liberating" concept which realistically reflects the multicultural, multi-ethnic composition of this country. *Id.* at 762.

[2] 42 U.S.C. §§ 1973, 1973c (1994).

[3] Lani Guinier, *Racing Democracy: The Voting Rights Cases*, 108 HARV. L.

prohibits discrimination in voting "on account of race or color"[4] and Section 5 serves as a check against racially-motivated, discriminatory modifications to voting qualifications and procedures,[5] race is an inevitable, if not necessary, subject in evaluating the legitimacy of asserted violations of Section 2[6] and Section 5,[7] as well as the appropriateness of proposed

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REV. 109, 109-11 (1994) [hereinafter *Racing Democracy*]. The problem is that the "rhetoric of individualistic, colorblind decisionmaking is impossible to reconcile with a statute that explicitly singles out racial groups for protection from political marginalization." *Id.* at 111.

[4] 42 U.S.C. § 1973(a) (1994). Section 2 states:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.

Id.

[5] 42 U.S.C. § 1973c (1994). Section 5 establishes a mandatory review system officiated by the Justice Department which applies to specified jurisdictions whenever they "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, or practice, or procedure with respect to voting different from that in force or effect" so as to guard against "the effect of denying or abridging the right to vote on account of race or color . . . ." *Id.* Currently, Section 5 applies to the states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia as well as to certain counties and political subdivisions in California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota. Joaquin Avila, *Section 5 of the Voting Rights Act: Judicial Interpretation, Its Significance for Localities*, *in* COMMUNITIES & THE VOTING RIGHTS ACT: A GUIDE TO COMPLIANCE IN THESE CHANGING TIMES 40 (National Civic League 1996).

[6] *See* Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986). The three prongs necessary to establish a Section 2 violation all emphasize racial voting patterns. *Thornburg*, 478 U.S. at 50-51; *see also* Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 594-96 (9th Cir. 1997) (relying upon district court's findings of fact on status of racial equality in voting); Sanchez v. Colorado, 97 F.3d 1303, 1310-26 (10th Cir. 1996) (reversing factual finding of no Hispanic vote dilution); Teague v. Attala County, 92 F.3d 283, 287-95 (5th Cir. 1996) (holding findings of district court erroneous in areas of political cohesiveness, racial bloc voting, and opportunity to participate in political processes).

[7] Young v. Fordice, ___ U.S. ___, 117 S. Ct. 1228, 1239 (1997). A Section 5 violation is triggered by evidence of a change in voting qualifications or procedures, notwithstanding "whether the change works in favor of, works against, or is neutral in its impact upon the ability of minorities to vote." *Young*, 117 S. Ct. at 1236. Though the majority of voting rights suits are brought under Section 2, actions still exist today to challenge some of the formal barriers to voting which the Voting Rights Act largely eliminated. *See* B.C. Foreman v. Dallas County,

remedies.[8] This keen deliberation on the stimulative effects of race exists in stark contrast to the colorblind theory that race should not influence voting jurisprudence. How then does one maintain a blind eye to race when the acknowledgment of Section 2 and Section 5 require contrary conduct?

While courts and legal theorists have acknowledged and elaborated on the significance of the debate between colorblind advocates and colorblind critics, few have proposed practical solutions to reconcile the differing positions. For the most part, commentators have approached the problem by arguing the "rightness" of one position and the "wrongness" of the other.[9] Unfortunately, the Supreme Court has offered little guidance on how to reconcile the predicament,[10] thus failing to squarely deal with the dilemma in view of the race problems which exist in this country.

Bernard Grofman and Chandler Davidson contend that

Texas, ___ U.S. ___, 117 S. Ct. 2357, 2358 (1997) (reviewing change in procedures for electing judges without obtaining preclearance); Price v. Bossier Parish Sch. Bd., ____ U.S. ____, 117 S. Ct. 1491, 1495 (1997) (resolving Section 5 issues in school board redistricting); Morse v. Republican Party of Va., ___ U.S. ___, 116 S. Ct. 1186, 1191 (1996) (challenging fee required by party in order to participate in nomination activities as poll tax); Lopez v. Monterey County, ____ U.S. ____, 117 S. Ct. 340, 343 (1996) (ruling on application of Section 5 to county ordinance).

[8] *See* Voinovich v. Quilter, 507 U.S. 146, 150-62 (1993) (illustrating degree of review of redistricting plans); Hays v. Louisiana, 936 F. Supp. 360, 362-66 (W.D. La. 1996) (representing example of extensive scrutiny to which redistricting plans are subjected).

[9] *See, e.g.*, ANDREW KULL, THE COLOR-BLIND CONSTITUTION 20-21 (1992) (concluding United States Constitution was colorblind at its inception to argue colorblindness theory); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (supporting colorblindness); Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 48-54 (1976) (discouraging colorblindness); John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 (1974) (challenging strict colorblindness model); Bryan K. Fair, *Foreword: Rethinking the Colorblindness Model*, 13 NAT'L BLACK L.J. 1, 64-73 (1993) (rejecting colorblindness); *cf.* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 62-68 (1991) (offering theoretical alternative to colorblind constitutionalism).

[10] *Racing Democracy*, *supra* note 3, at 109, 113. The U.S. Supreme Court has failed to ascertain a workable solution on this issue and "today exercises an unconstrained discretion in determining the permissible and impermissible uses of race." KULL, *supra* note 9, at 5-6.

the two positions are not as divergent as they may seem, positing that though each seeks the same "ends"—"a color-blind society"—the primary dispute is over the "means."[11] Upon the faith of this observation, the ideal solution would appear to be a system of voting which responds to the fundamental goals of each position. If such a model existed which incorporated both concerns, one would imagine that proponents of colorblindness would be content as long as race was not taken into account but the potency of the individual vote preserved,[12] and that race-consciousness advocates would not complain of the absence of racial considerations if furnished a method which assured all citizens full, fair and equal participation in the political process, especially for those to whom this has been denied.

This comment considers the viability and repercussions of such an electoral system. Part I presents a brief overview of the theories underlying the conflict between the competing notions of colorblindness and race-consciousness. The Supreme Court's position in this controversy is also reported based on its opinions in a line of recent voting rights cases to evidence its lack of a definitive, consistent answer to the dissension between the two factions. Part II introduces the concept of "constructive anonymity" and explains how it may be used to outline a voting scheme which utilizes a literal interpretation of colorblindness in contrast to the rhetorical version embraced by majoritarian conservatives.[13] In Part III, a pro-

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[11] Bernard Grofman & Chandler Davidson, *Postscript: What is the Best Route to a Color-Blind Society?, in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 300, 300-01 (Bernard Grofman & Chandler Davidson eds., 1992).

[12] *See* Reynolds v. Sims, 377 U.S. 533, 558 (1964) (advancing "one person, one vote" standard).

[13] *See* John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 322 (1994) (reasoning that rhetoric shifts focus away from true issue while maintaining conflict). Rhetoric has served as a useful weapon for the conservative majority to avoid race issues. *Id.* at 322; *see also* Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 2 (1990) (asserting that "[r]hetoric becomes the smooth veneer to the cracked surface of the real and hard choices in law").

posed model for a colorblind electoral system is presented, the structure of which is based on the exploitation of constructive anonymity, elaborating on its effects and practicalities. A fundamental question is then posed to champions of a colorblind society and Constitution: would you be prepared to accept the ramifications of an exacting theory which exploits colorblindness to its fullest and comes closest to placing both candidates and voters at the same vantage point? This comment concludes that they would not, preferring instead to maintain under the guise of equal protection and through the vehicle of rhetoric the existence of those elements which have enabled them to be racially biased in fear of two things: (1) the possibility that the guard they have gone to great pains to establish will be infiltrated by members of various races who are comparably capable of performing the task of governing and (2) the implementation of legislation which considers the fate of all of this country's citizens, not only those that comprise the conservative majority. Unsurprisingly, such a model would be equally unacceptable to colorblind critics as it would not only ignore the multicultural, multi-ethnic composition of our society and require the submersion of the characteristics of different groups into an indistinct mass, but also fail to recognize the transition period that this country must certainly go through in order to adequately respond to race issues as a collective citizenry. Since the concept of colorblindness fails in both its rhetorical and literal applications, its theory should no longer be urged upon our impressionable society as it delays thoughtful discussion on race issues in its selling of an inappropriate solution.

I. Race Consciousness v. Colorblindness

A. The Competing Theories

The first introduction of the idea of a colorblind Constitution is undisputably attributed to Justice Harlan in his dissenting opinion in *Plessy v. Ferguson*.[14] Since then, however,

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[14] 163 U.S. 537 (1896).

the meaning of his words "Our Constitution is color-blind"[15] has been subject to many inconsistent interpretations. Modern conservatives coin the phrase in the name of the Fourteenth Amendment to condemn most affirmative and/or remedial legislation involving racial considerations,[16] including the Voting Rights Act.[17] To such colorblind proponents, political

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[15] *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). "[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. *Our constitution is color-blind*, and neither knows nor tolerates classes among citizens." *Id.* (emphasis added).

[16] Peller, *supra* note 1, at 762. Ironically, "conservatives utilize the very rhetoric of tolerance, color-blindness, and equal opportunity that once characterized progressive discourse to mark the limits of reform." *Id.*; *see also* Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 837 (1995) (stating that "the same voices that resisted integration, have seized upon the liberal rhetoric of colorblindness to call for an end to race-conscious remedies"). Today, the battle to overturn affirmative, remedial plans persists as is evident in California's passing of its Civil Rights Initiative, Proposition 209 which prohibits, among other things, "preferential treatment" on the basis of color. Ronald Turner, *The Dangers of Misappropriation: Misusing Martin Luther King, Jr.'s Legacy to Prove the Colorblind Thesis*, 2 MICH. J. RACE & L. 101, 108, 130 n.36 (1996); *see also* Earl G. Graves, *Living King's Dream*, BLACK ENTERPRISE, Jan. 1997, at 9 (noting irony that at time voters passed Proposition 209, evidence of blatant racial discrimination in employment was brought to public attention). This race to halt such plans is adequately described as "certainly premature." Christo Lassiter, *The New Race Cases and the Politics of Public Policy*, 12 J.L. & POL. 411, 415 (1996).

[17] Chandler Davidson & Bernard Grofman, *Editors' Introduction* to QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 3, 3 (Chandler Davidson & Bernard Grofman eds., 1994). From its inception, the Voting Rights Act encountered massive resistance. *Id.* After it largely eliminated formal barriers to voting like the poll tax and literacy tests, other means developed in an attempt to circumvent its express mandates. Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990, *supra*, at 22-24. For instance, in Mississippi, when black voter registration dramatically increased between 1965 and 1967, the Mississippi legislature enacted a "host of bills" to secure white positions of power. Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 316 (1997) [hereinafter *Loss and Redemption*].

Colorblind advocates have gone so far as to turn the Voting Rights Act's remedial advances into an assault upon race-conscious districting, insisting incredulously that increasing the number of black representatives in government detrimentally impacts their ability to effect legislation which responds to the needs of their constituents. *Id.* at 297-99. Classified in terms of the "bleaching critique," such a condition is purported to result from the reluctance of majority-white legis-

equality can only be secured by blanketly implementing race-neutral principles[18] upon the incorrect premise that no more need be done to establish racial, cultural, political and social equality.[19] From this perspective, any statutory or judicial attention to the phenomena of racial discord in this country is unjustifiably nothing more than making the minority citizen the "special favorite of the law."[20] Thus, under the colorblind

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lators to bargain with black legislators, blamed largely on the creation of majority-minority districts, as the majority has no incentive to recognize minority interests because they have no bearing on the majority's political survival. *Id.* (citing ABIGAIL THERNSTROM, WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 124-25 (1987)). Under this theory, the Voting Rights Act succeeds in presenting black politicians with the opportunity to be winners at the polls but denies similar success when measuring their affect on governance. *Id.* at 297-98.

[18] *Racing Democracy*, *supra* note 3, at 110. "Some apparently believe that a society once deliberately segregated by race cannot be deliberately integrated by race." *Id.*

[19] Jerome McCristal Culp, Jr., *Understanding the Racial Discourse of Justice Rehnquist*, 25 RUTGERS L.J. 597, 603 (1994) [hereinafter *Racial Discourse*]. This reasoning may be classified as the "status quo blindness assumption" which maintains that the "status quo circumstances of black citizens [in America] are fair." *Id*; *see also* Jerome M. Culp, Jr., *Black People in White Face: Assimilation, Culture, and the* Brown *Case*, 36 WM. & MARY L. REV. 665, 669, 667-684 (1995) (discussing inappropriateness of race neutral policy in its attempts to promote assimilation); Pamela S. Karlan & Peyton McCrary, *Without Fear and Without Research: Abigail Thernstrom on the Voting Rights Act*, 4 J.L. & POL. 751, 777 (1988) (reviewing ABIGAIL THERNSTROM, WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (1987)) (cautioning against risk of viewing "the Second Reconstruction as complete today [merely] because black voters have the formal right to enter the voting booth"). Such thinking ignores the fact that minorities are still far behind the majority in both the economic and political arenas. CLARENCE PAGE, SHOWING MY COLOR: IMPOLITE ESSAYS ON RACE AND IDENTITY 14-15 (1996). "It is fashionable in today's America to behave as if we have, at last, transcended race, as if we could all just forget about it and get on with our 'color-blind' ways." *Id.* at 16. For an excellent source on contemporary disparities in wealth between blacks and whites as a result of government policies and how colorblind principles cannot serve to eliminate these gaps, see generally MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 85-150 (1995).

[20] The Civil Rights Cases, 109 U.S. 3, 25 (1883). Even colorblind advocates would find it quite surprising that as early as 1883, the Supreme Court, satisfied with the black citizen's status in America, found that the black citizen had due to "beneficent legislation" so "shaken off the inseparable concomitant of [slavery] that it declared:

scheme, the remedy to racism effectively results in the denial of its very existence.[21]

Colorblind critics, however, argue that Harlan's concept should not be interpreted so broadly as to apply to political and social rights for it was only meant to pertain to civil rights at best, there being no historical basis for any other translation.[22] They perceive instead a chasm between racial justice and the total disregard of race, characterizing as "legal fantasy" the assumption that "ignoring race in making social policy will bring about justice or achieve morality."[23] In heralding race-consciousness as the prominent means to realize true equality, colorblind dissenters emphasize the value in preserving the cultural differences among American citizens and the loss in having these differences submerged into a narrow and inappropriately constrained view of nationalism.[24] They vehemently denounce the treatment by colorblind

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> [T]here must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights, as a citizen or a man, are to be protected in the ordinary modes by which other men's rights are protected.

The Civil Rights Cases, 109 U.S. at 25.

[21] Lawrence, *supra* note 16, at 837. One author characterized this denial as the "no-out-loud-talk-about-race" rule, which "treats the demeaning social construction of race as if it were a bad habit that one could break by not using express racial categories." *Id.* Under this approach, "there is no racism to remedy." *Id.*

[22] Jeffrey Rosen, *The Color-Blind Court*, 45 AM. U. L. REV. 791, 793 (1996) [hereinafter *The Color-Blind Court*]. Rosen characterizes the adoption of the conservatives' approach by the Supreme Court as judicial activism as the "Framers of the Fourteenth Amendment said repeatedly that [it] was intended to protect [only] civil rights." *Id.* at 792, 796-97; *see also* Jeffrey Rosen, *Conservatives v. Originalism*, 19 HARV. J.L. & PUB. POL'Y 465, 465 (Winter 1996) (concluding that "Fourteenth Amendment, as originally understood, did not apply to political rights").

[23] Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 162-63 (1994) [hereinafter *Colorblind Remedies*]. Restricting the use of race in social policy implicitly fails in view of the fact that changes in policy are, of course, no guarantee for changes in negative private attitudes and negative private actions about race. *Id.* at 166.

[24] Neil Gotanda, *Failure of the Color-blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1141 (1996) [hereinafter *Color-blind Vision*]. "In the color-blind vision, all individuals are so-

advocates that "the immutable characteristic of skin color is meaningless."[25] Thus, race-consciousness proponents believe that Justice Harlan's statement should be interpreted in the context in which it was presented, one so often conveniently omitted,[26] to expose that he was in fact not prohibiting the use of racial classifications, rather underscoring and perpetuating the notion of white supremacy.[27]

B. The Supreme Court's Position

In response to the rallying cry of conservatives amidst the call for race-conscious measures, the Supreme Court has not as yet clearly expressed a definitive compromise. If anything, its decisions, which attempt to clarify the permissible role of race in post-Voting Rights Act vote dilution and reapportionment cases, contribute to the confusion. Though the Court has frequently reiterated that strict proportional representation is prohibited,[28] it has muddled the limits of acceptable race-based considerations, thereby strengthening the defensive position of colorblind supporters that race should not serve as

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cially 'de-raced'" so as to assimilate into the mass of majority society. *Id.*

[25] Turner, *supra* note 16, at 112. This treatment of race fails as it "denies a real linkage between race and oppression." Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1768 (1993).

[26] Plessy v. Ferguson, 163 U.S. 537, 559 (1896). The immediately preceding, oft-omitted text states:

> The white race deems itself to be the dominant superior race in this country, and so it is in prestige and achievements and education and wealth and in power. So I doubt not it will continue to be for all time only if it remains true to its great heritage and holds fast to the principles of constitutional liberty . . . .

Plessy, 163 U.S. at 559.

[27] T. Alexander Aleinikoff, *Rereading Justice Harlan's Dissent in* Plessy v. Ferguson: *Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961, 961-70; *see also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 325 (1978) (arguing Fourteenth Amendment only prohibits racial classifications when they lead to racial castes). "[A]t its very inception, the doctrine of judicial colorblindness was deemed to be perfectly compatible with the perpetuation of white supremacy." Jamin B. Raskin, *From "Colorblind" White Supremacy to American Multiculturalism*, 19 HARV. J.L. & PUB. POL'Y 743, 745 (1996).

[28] Thornburg v. Gingles, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring); City of Mobile v. Bolden, 446 U.S. 55, 77-80 (1980).

a basis for special treatment in the electoral process.[29]

The Supreme Court's haziness[30] in this area is typified in the analytical approaches it has utilized in reviewing racial gerrymandering claims. Leading with its decision in *Shaw v. Reno*[31] ("*Shaw I*") and following with *Miller v. Johnson*,[32] *Bush v. Vera*,[33] and *Shaw v. Hunt*[34] ("*Shaw II*"), all actions raising Fourteenth Amendment challenges to redistricting measures in response to the mandates of Section 2 and Section 5, the Court's methodological course is far from instructive. Appearing to neglect its prior holding that the creation of districts using racial criteria does not violate the Constitution,[35] the Court effectively facilitated challenges to race-based districts, ultimately undermining a viable means to minority representation.[36] Not only does this reflect the absence of a clear standard by the Court but also its equivocal nature on race matters.

First, in *Shaw I*, the Court responded to a challenge against the configuration of two majority-black North Carolina districts[37] by introducing a "new type of constitutional viola-

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[29] *Colorblind Remedies*, *supra* note 23, at 177-80. Lower courts unjustifiably and are readily disposing of Section 2 claims. *See, e.g.*, Lewis v. Alamance County, 99 F.3d 600, 603, 615-617 (4th Cir. 1996) (affirming summary judgment ruling of no Section 2 violation).

[30] Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 300-01 (1995-96) [hereinafter *Still Hazy*].

[31] 509 U.S. 630 (1994).

[32] ___ U.S. ___, 115 S. Ct. 2475 (1995).

[33] ___ U.S. ___, 116 S. Ct. 1941 (1996).

[34] ___ U.S. ___, 116 S. Ct. 1894 (1996).

[35] *See* United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 165 (1978). The Court has held that when race is cast in a remedial context with respect to a disadvantaged class rather than in a setting that aims to demean or insult any racial group, race assignment may be permissible. *Carey*, 430 U.S. at 165.

[36] LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, 1995-1996 ANNUAL REPORT, 27, 28 (1997) [hereinafter LAWYERS' COMMITTEE ANNUAL REPORT]. The establishment of majority-minority districts resulted in the southern states of Alabama, Florida, North Carolina, South Carolina and Virginia electing African-American representatives in 1992 to congress for the first time since Reconstruction. *Id.* at 26-27.

[37] Shaw v. Reno, 509 U.S. 630, 633 (1994). The districts represented the North Carolina legislatures's second attempt in obtaining Justice Department

tion" in its adoption of a "bizarreness" standard.[38] The Court stated its primary question on review in *Shaw I* as whether a claim for relief existed merely in plaintiffs' allegations "that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a 'color-blind' electoral process."[39] Recognizing that such districts were not absolutely impermissible,[40] the Court ruled the allegations sufficient for a claim under the Equal Protection Clause due to the "extremely irregular" shape of the districts.[41] It concluded that North Carolina's "legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lack[ed] sufficient justification."[42] Further, in remanding the case, the Court determined that strict scrutiny should apply if the racial gerrymandering claims were substantiated.[43] Though its "bizarreness" test inherently signals imprecision due to its dependence on a threshold level from which to evaluate district configuration, a level which may vary from case

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preclearance. *Shaw I*, 509 U.S. at 633.

[38] Bernard Grofman & Lisa Handley, *1990s Issues in Voting Rights*, 65 MISS. L.J. 205, 209 (1995). The Court's novel definition represents a "backlash" in opposition to the requirements of the Voting Rights Act. *Id.*

[39] *Shaw I*, 509 U.S. at 641-42. Justice O'Connor, writing for the Court, stated that the precise articulation of the plaintiffs' complaint was "critical" to the outcome of the issue. *Id.* at 641.

[40] *Id.* at 642. The district court below, in responding to the plaintiff's claims that the creation of two majority-black districts constituted unconstitutional race-based districting, relied primarily on the Supreme Court's decision in *Carey*. Shaw v. Barr, 808 F. Supp. 461, 465, 470 (1992). It found that the districts were not formed to intentionally deprive white voters. *Barr*, 808 F. Supp. at 465. Because the requisite intent required for equal protection analysis was lacking due to the absence of invidious discrimination, the court dismissed the complaint. *Id.* at 470, 473.

[41] *Shaw I*, 509 U.S. at 642. The Court found it "unsettling how closely the North Carolina plan resemble[d] the most egregious racial gerrymanders of the past." *Id.* at 641.

[42] *Id.* at 659. The Court stated that in the area of apportionment, "appearances do matter." *Id.* at 647.

[43] *Id.* at 658. The Court attempted to distinguish *Shaw I* from its rulings in prior vote dilution cases. *Id.* at 653.

to case,[44] the Court declined to articulate how to comply with this standard and, further, to describe the precise limits of its application.[45]

The decision in *Miller v. Johnson* two years later shrouded an additional veil of ambiguity on the Court's guidelines of reapportionment review in its pronouncement of the "predominant factor" test.[46] *Miller* arose from a claim by white voters urging the impropriety under *Shaw I* standards of one of three majority-black districts in a Georgia redistricting plan.[47] Rejecting the state's argument that proof of a district's bizarre shape was a threshold requirement to a *Shaw I* claim, the Court explained that the primary factor was the use of race to separate voters into districts.[48] According to the Court, a district-challenging plaintiff's success rests upon its showing through either circumstantial or direct evidence that "race was the predominant factor motivating the [state] legislature's

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[44] *Still Hazy*, *supra* note 30, at 300-01.

[45] Grofman & Handley, *supra* note 38, at 214-16. Justice White acknowledged that the majority's ruling would hinder a state's efforts to resolve political inequalities, stating that "the majority's novel type of claim also makes no sense." *Shaw I*, 509 U.S. at 670 (White, J., dissenting). Justice Blackmun found it "particularly ironic" that the majority's abandonment of settled law occurred when white voters objected to a North Carolina plan which "sent black representatives to Congress for the first time since Reconstruction." *Id.* at 676 (Blackmun, J., dissenting). Additionally, Justice Souter recognized that race is an inherent consideration in adopting redistricting plans, criticizing the majority's "theoretical inconsistency" in having different approaches to electoral districting and other state governmental decisions. *Id.* at 680, 684. *See generally* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 536-87 (1993) (providing alternative for assessing district appearance after *Shaw I*).

[46] Laughlin McDonald, *Can Minority Voting Rights Survive* Miller v. Johnson*?*, 1 MICH. J. RACE & L. 119, 141-47 (1996).

[47] Miller v. Johnson, 115 S. Ct. 2475, 2485 (1995). Georgia's plan, specifically tailored to meet Section 5's preclearance requirements, obtained Justice Department approval on its third attempt. *Id.* In the next election, black candidates were elected to Congress from each of the three majority-black districts. *Miller*, 115 S. Ct. at 2485.

[48] *Id.* at 2485-86. Revealing that vote dilution claims implicated wholly different standards, the Court, in an attempt to clarify its holding, announced that it never meant to foreclose other proof of equal protection violations by declaring its *Shaw I* standards. *Id.* at 2486.

decision" which "subordinated traditional race-neutral districting principles."[49] Thus, under *Miller*, if race is the predominant factor in a redistricting scheme, even in the presence of accepted legitimate factors and the absence of "any claim or proof of racially discriminatory purpose or effect,"[50] the scheme lies open to challenge. A problem of vagueness lies therein: how does one define when race qualifies as the predominant factor in an apportionment plan and have it serve as a universal guide?[51]

The subsequent case of *Bush v. Vera* presented a confusing answer to this question and furthered the problematic standards originated in both *Shaw I* and *Miller*. *Bush* involved a challenge to a Texas redistricting plan that created majority African-American and Hispanic districts and reconfigured an existent African-American majority district in response to the 1990 census.[52] The Court held that strict scrutiny applied to redistricting legislation which fell under either *Shaw I* or *Miller* principles,[53] justified by Justice O'Connor as reliance

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[49] *Id.* at 2488. The Court referred to such principles "including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* Justice Stevens dissented to the majority's departure from its vote dilution standards as well as its failure, as in *Shaw I*, to qualify the precise injury for standing purposes suffered by the district challengers. *Id.* at 2497 (Stevens, J., dissenting). Justice Ginsburg added that the majority's opinion represented a "counterforce" to a state's redistricting efforts in furtherance of the Voting Rights Act. *Id.* at 2507 (Ginsburg, J., dissenting).

[50] Frank R. Parker, *The Damaging Consequences of the Rehnquist Court's Commitment to Color-Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763, 772 (1996). *Miller* stands as the first case in which the Supreme Court invalidated a districting plan without such proof. *Id.*

[51] *Voting Rights and Race-Based Districting*, 109 HARV. L. REV. 160, 165 (1995). It has been stated that *Miller* "established a standard that is at least as difficult [as *Shaw I*] to comprehend" which "leads the Court to disregard the political realities that are critical to adjudicating democratic rights. . . . [E]ven a repeal of the Voting Rights Act itself could not legislate the color-blind redistricting process for which the Court yearns." *Id.* at 165, 166.

[52] Bush v. Vera, 116 S. Ct. 1941, 1951 (1996). The plaintiffs alleged that twenty-four of the thirty congressional districts were unconstitutional, though the three-judge district court found only three improper. *Bush*, 116 S. Ct. at 1951.

[53] *Id.* at 1951-52.

on stare decisis for the sake of legitimacy.[54] Based on this reliance, the Court affirmed the district court's finding that the districts at issue were unconstitutionally drawn, rejecting all of the state's asserted compelling interests.[55] In dissenting to the majority's opinion, Justice Stevens noted that the ruling "restrict[ed] the ability of States to conform their behavior to the Voting Rights Act while simultaneously complying with other race-neutral goals."[56] Justice Souter echoed this concern, dissenting that the "failure to provide a practical standard for distinguishing between the lawful and unlawful use of race" persists.[57] Thus, after *Bush*, it appeared that districts which were created to accommodate any changes in population could be attacked from almost any angle.

Decided on the same day as *Bush*, *Shaw II* considered the ruling of the district court made on remand of *Shaw I*. The district court held that the redistricting plan survived strict scrutiny in spite of the bizarrely-shaped districts, finding compliance with Sections 2 and 5 a compelling state interest.[58]

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[54] *Id.* at 1964.

[55] *Id.* at 1951-54. Though the Court identified *Bush* as a "mixed motive" case, it found that none of the reasons advanced by the state satisfied the "narrowly tailored" requirement. *Id.* at 1952, 1960. It discounted as noncompelling arguments that the state had an interest in: (1) "avoiding liability under the 'results' test" of Section 2, (2) "remedying past and present racial discrimination," and (3) complying with Section 5. *Id.* at 1959-63.

[56] *Id.* at 1975 (Stevens, J., dissenting). Additionally, Justice Stevens, joined by Justices Ginsburg and Breyer, characterized the majority's standards as "still-developing law" as venturing "into a jurisprudential wilderness that lacks a definable constitutional core and threatens to create harms more significant than any suffered by the individual plaintiffs challenging these districts." *Id.* (Stevens, J., dissenting). These comments essentially reiterate the dissenters' views in *Shaw I* and *Miller*. *See supra* notes 45 and 49.

[57] *Bush*, 116 S. Ct. at 1998 (Souter, J., dissenting). Souter, also joined by Ginsburg and Breyer, stated that the Court's opinions since *Shaw v. Reno* have done little to reach the goal of a "clearer or more manageable" standard. *Id.* (Souter, J., dissenting).

[58] Shaw v. Hunt, 861 F. Supp. 408, 437 (E.D.N.C. 1994). After finding strict scrutiny applicable because race played a role in drawing the challenged districts' lines, the district court held the failure to satisfy the Voting Rights Act and the need to eradicate the effects of past and present discrimination as representing a "strong basis in evidence" to support the state's actions. *Hunt*, 861 F. Supp. at 439-43. Moreover, it declared that the state's redistricting plan as adopted would

However, the Supreme Court reversed in disagreement, further dismissing as inadequate justifications similar to those presented in *Bush*.[59] In particular, it held the interest in remedying past discrimination insufficient to be compelling.[60] The Court maintained that in order to overcome this deficiency, such discrimination would have to be "identified" instead of presented as a "generalized assertion of past discrimination, and a "strong basis in evidence" would need to be shown before affirmative remedial action could be implemented.[61] Significantly, the Court still did not address, even after being given the opportunity in *Miller* and *Bush*, whether compliance with the Voting Rights Act could under certain circumstances serve as a compelling government interest.[62]

The Supreme Court's rulings in these cases collectively may be classified as regressive, or at least stagnant, influenced in large part by each justice's views on the issue. The coalition of Chief Justice Rehnquist and Justices Kennedy, Scalia and Thomas endorse a broad, all encompassing view of racial classifications by considering them all to be "inherently injurious."[63] At the other end of the spectrum are Justices

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only be a burden on third parties such as the plaintiffs if the effect was to deprive them of equally weighted votes. *Id.* at 454. Finally, it suggested that if there was indeed no longer a need to follow the mandates of the Voting Rights Act, such should be given effect by Congress' declaration, not the federal courts. *Id.* at 455.

[59] Shaw v. Hunt, 116 S. Ct. 1894, 1902-05 (1996). In the Court's eye, North Carolina's means of "remedying the effects of past or present racial discrimination," seeking approval under Section 5, and avoiding Section 2 liability was not narrowly tailored, though the Court admitted that it had not provided particular instruction on how to achieve proper justification. *Shaw II*, 116 S. Ct. at 1902-05.

[60] *Id.* at 1902.

[61] *Id.* at 1902-03. The Court stated the same conclusion in *Bush*. *Bush*, 116 S. Ct. at 1962-63.

[62] *Shaw II*, 116 S. Ct. at 1903. Once again, the Court found no need to reach "that question" as it did in *Shaw I* and *Miller*. *Id.*; *Shaw I*, 509 U.S. at 657; *Miller*, 115 S. Ct. at 2490-91.

[63] Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Claims*, 1 MICH. J. RACE & L. 47, 49 (1996); *The Color-Blind Court*, *supra* note 22, at 791. Supreme Court justices "feel free to adopt specific moral agendas and incorporate them in their interpretation of constitutional law." Stephen E. Gottlieb, *Three Justices in Search of a Character: The Moral Agendas*

Stevens, Souter, Breyer and Ginsburg, who conclude that race-based districting does not violate the Constitution, criticizing the Rehnquist group's inability to distinguish between standing to sue and justifiable injury.[64] Justice O'Connor resides somewhere in between the two groups, possessing pendulum-like power to influence the Court's future decisions on this issue depending upon which way her vote swings.[65] In the cases of *Shaw I*, *Miller*, *Bush* and *Shaw II*, however, she has aligned with the ultra conservatives, resulting in 5-4 opinions in support of the colorblind ideology.

The resultant effect of the Court's varied perspectives due to its division on the role of race literally places state legislatures between a rock and a hard place with nowhere to draw district lines.[66] If they do not use race-conscious criteria to reorganize their districts, they may face liability under Section 5; however, if they do, they may face Section 2 liability.[67] The question of when race is the legitimate basis of a cognizable claim remains as well as the issue of how state legislatures should tailor their actions accordingly.[68] Moreover, the

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of Justices O'Connor, Scalia and Kennedy, 49 RUTGERS L. REV. 219, 220 (1996).

[64] Issacharoff & Goldstein, *supra* note 63, at 49-50.

[65] *Id.* at 50, 66-67.

[66] *Still Hazy*, *supra* note 30, at 306-11. Justice Stevens reached this conclusion in his dissenting opinion in *Bush* and thought states would out of frustration either abandon voluntary compliance with Section 2 or relinquish the redistricting effort to federal courts so as to be free of the responsibility and to avoid "schizophrenic second-guessing." *Bush*, 116 S. Ct. at 1991 (Stevens, J., dissenting). Justice Souter asserted a similar opinion, simply stating, "States, in short, have been told to get things just right . . . without being told how to do it." *Id.* at 2006 (Souter, J., dissenting).

[67] *Still Hazy*, *supra* note 30, at 310. Karlan states:

> [J]urisdictions will find themselves walking a tightrope. If they do not draw majority-black districts in most areas with substantial black populations, they will both find it difficult to obtain preclearance and, if they do, will face traditional section 2 lawsuits. But if they do draw those districts, they will find themselves embroiled in wrongful districting litigation.

Id.

[68] *See, e.g.*, Johnson v. Mortham, 926 F. Supp. 1460, 1495 (W.D. Fla. 1996) (finding district boundaries unconstitutional); King v. State Bd. of Elections, No. 95-C-827, 1996 WL 130439, at *28-29 (N.D. Ill.) (finding districting plan constitu-

Court's standards seemingly do not offer a solution to colorblind proponents or critics as the inability to apply them uniformly defies their chances to be embraced by either group beyond the ruling of each individual case. With all of the Supreme Court's inconsistency and ambiguity on the role of race,[69] it is no wonder that the conservatives' rhetorical message of colorblindness begins to sound dangerously rational.

II. THE ANONYMITY TOOL

Though the Voting Rights Act has served to eliminate barriers to minority voting, it is another matter to eliminate the prejudices which erected those barriers and sustained resistance to a government which allows all of its citizens to participate.[70] Today, many voters cannot look past racial distinctions to evaluate the characteristics they desire in a representative.[71] Though issues are regarded to be of pivotal con-

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tional though acknowledging lack of Supreme Court standards), *vacated*, 117 S. Ct. 429 (1996). Justice Stevens characterized these district court decisions as "schizophrenic second-guessing." *Bush*, 116 S. Ct. at 1991 (Stevens, J., dissenting). *See also* Jenkins v. Red Clay Consol. Sch. Dist., 116 F.3d 685, 699-700 (3d Cir. 1997) (illustrating inconsistency in lower courts over at-large election scheme); Chiles v. Davis, 95 F.3d 46, 46 (5th Cir. 1996) (affirming denial of relief in view of vote dilution); Rural West Tenn. African-Am. Affairs Council, Inc. v. McWherter, 877 F. Supp. 1096, 1105 (W.D. Tenn.) (espousing rule that no Section 2 violation exists in districts where blacks comprise 25% of the voting-age population), *aff'd*, 116 S. Ct. 42 (1995). In the battle towards political equality for every individual, it is of significant importance to note that often those state officials who are placed in the position of defending redistricting plans are the same ones who were adverse to creating conditions for increased minority political participation. LAWYERS' COMMITTEE ANNUAL REPORT, *supra* note 36, at 28.

[69] See Shaw II, 509 U.S. 630, 657 (1994), for example, in which Justice O'Connor commented that race-conscious districting may hinder the country's perception of race by "threaten[ing] to carry us further from the goal of a political system in which race no longer matters," but later stated that the Fourteenth and Fifteenth Amendments do not require racial blinders in apportionment matters. *See also* Holder v. Hall, 512 U.S. 878, 891-945 (1994) (Thomas, J., concurring) (stating that "the assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution").

[70] *See generally* Davidson, *supra* note 17, at 20-27 (tracing background, evolution and impact of Voting Rights Act).

[71] *See* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the*

cern in an election, patterns of voting behavior reveal a number of other factors which influence election results with race being a predominant one.[72] True to form, colorblind advocates take advantage of this condition to impart their views[73] on American society, a society that is highly impressionable due to its desperate search for a way to resolve its racial quandary,[74] and highly susceptible to persuasive rhetoric.[75] Colorblind advocates have essentially used the tool of rhetoric to mask the "cracked surface of the law's response to race rela-

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Theory of Black Electoral Success, 89 MICH. L. REV. 1077, 1112-14 (1991) [hereinafter *The Triumph of Tokenism*] (discussing racial vote polarization); *see also* Barbara Y. Phillips, *Reconsidering* Reynolds v. Sims: *The Relevance of Its Basic Standard of Equality to Other Vote Dilution Claims*, 38 HOW. L.J. 561, 584 (1995) (acknowledging voting behavior of white subgroups).

[72] *See* Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935, 960-62, 987-88, 993-94, 1021 n.279 (1996) (discussing factors which influence voting in presidential elections such as party, income level, age, and education, noting race as important factor); Richard Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1369-70 (1995) (reviewing QUIET REVOLUTION IN THE SOUTH) (discussing reasons for racially polarized voting)); *see also The Triumph of Tokenism*, *supra* note 71, at 1154 nn.167-69 (listing numerous sources which discuss influences on voting behavior). Guinier states that "absent compelling reasons to do otherwise, whites and blacks tend to vote for persons of their own racial/ethnic background." *Id.* at 1112.

[73] Raskin, *supra* note 27, at 745. "The backlash against multiculturalism masquerades as a defense of colorblindness and neutrality, but the veneer is very thin. Scratch colorblindness, and white supremacy comes to the surface pretty quickly. Colorblindness is now the main rhetorical device mobilized to defend racial privilege and dominance." *Id.*

[74] *Racing Democracy*, *supra* note 3, at 111. The direction of the resolution varies depending on where one falls along the political spectrum: members of unrepresented groups seek full representation while members of the ruling majoritarian group seek to maintain the status quo, often finding equity accomplished in the election of a handful of African-Americans to representative positions. *See generally* Joyce Jones, *Out With the Old*, BLACK ENTERPRISE, Jan. 1997, at 22 (reporting results of November 1996 elections in House and Senate).

[75] *Colorblind Remedies*, *supra* note 23, at 163. The reason that Americans have ingested the myth that colorblindness is *the* means to racial justice are three-fold: (1) many believe this was the goal of the Civil Rights Movement and Dr. Martin Luther King's statement that people ought "not to be judged by the color of their skin but by the content of their character," (2) colorblind principles are easy to accept because they avoid confronting "the morality or justice of assimilation, nationality, or cultural difference and (3) "Americans simply do not have a concept of justice that can take account of racial difference" that colorblindness is thought to encompass. *Id.*

tions" and their own agenda of majority supremacy.[76]

Exploring the concept of anonymity in this context may be instructive in both revealing the true agenda of colorblind advocates[77] and alleviating the existence of racial bias towards the achievement of political equality. As Jonathan Still explains:

> Anonymity derives from the idea that the election system treats the voters as anonymous in that the outcome does not depend on the identities of the voters holding particular preferences or particular positions in the electoral structure, but depends only on the set of preferences which are held.[78]

As illustrated by Still, for instance, the results of an election on a single issue which garnered 60% of the votes in its favor and 40% against would turn out the same "no matter how voters might trade places" because "[w]hat counts is the votes that are cast, not who casts them (or where they are cast from)."[79] Hence, the vehicle of anonymity has the potential to rid the voting process of extraneous issues such as race and wealth and unmask voter preferences in their purest of states.

As far as the political arena is concerned, two types of anonymity may be acknowledged: destructive and constructive. Destructive anonymity is present, for example, when anonymi-

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[76] Ross, *supra* note 13, at 2, 3-9. Rhetoric has been used throughout this country's history to justify choices on race matters including those made in Supreme Court decisions. *Id.* at 8-9. This use of rhetoric has been attributed to the perpetuation of "white innocence" and "black abstraction." *Id.* at 4-8. "White innocence" insists on the guiltlessness or absence of responsibility of white people for the racial wrongs that they have committed over the years. *Id.* at 3-5. "Black abstraction" obscures the humanness of blacks by placing them outside the social context of whites so as to resist empathy and make them comfortable with the degradation of blacks caused by their conduct. *Id.* at 8.

[77] Raskin, *supra* note 27, at 745. Demographic statistics indicate that people of color will comprise the majority in many of America's most prominent cities, the promise of which may threaten members of the majority so that they resist the reality of multiculturalism and cling to white supremacy. *Id.* at 745-46.

[78] Jonathan W. Still, *Political Equality and Election Systems*, 91 ETHICS 375, 383 (1981). Still recognizes anonymity as one of a group of distinct criteria for achieving political equality. *Id.* at 382-83.

[79] *Id.* at 383. The only way that the election result would change is if a significant number of voters switched their preference. *Id.*

ty is used as a shield by candidates to promote negative images during the campaign stage of an election in order to gain some advantage.[80] In contrast, constructive anonymity seeks to preserve the integrity of the voting process, for instance, in the utilization of the secret ballot to protect voters from coercive threats.[81] While destructive anonymity may be discouraged, constructive anonymity should be utilized for a number of positive purposes.

One such purpose exists in the facilitation of an election that would meet the criteria described by Still as one in which the outcome turned solely upon the "set of preferences" held.[82] Such an election would strive to truly make issues the pivotal concern[83] in order to unmask pure voter preference and rid the voting process of extraneous matters such as the race of the candidates as well as the voters. Political equality may be achieved by eliminating non-substantive factors which cause a voter to prefer one candidate over another.[84] Ironically, the literal application of the colorblind concept possesses the qualities to achieve this goal, because it would eliminate the race ingredient to the point of its nonexistence, resulting in an election which isolates positions on issues and allows them to determine who wins or loses.[85] Through this usage, constructive

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[80] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 382-85 (1995) (Scalia, J., dissenting) (recognizing use of anonymity to shield negative conduct).

[81] *See* Saul Levmore, *The Anonymity Tool*, 144 U. PA. L. REV. 2191, 2220 (1996).

[82] *See supra* notes 78-80 and accompanying text.

[83] Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 437, 475 (1993) [hereinafter *Minority Interests*]. It is unfortunate that the "interjection of an issue-oriented dimension" into a political contest must be presented as a novel approach in this present age in which "issue discussion or policy debate" has become subservient to the efficiency of "emotion-based image-making." *Id.* at 475 n.106. Voters are more apt to notice those candidates who are marketed with "star quality" traits instead of evaluating their choices based on what each candidate has to say. *Id.*

[84] *See* Still, *supra* note 78 and accompanying text.

[85] LAWYERS' COMMITTEE ANNUAL REPORT, *supra* note 36, at 28. It has recently been shown that the merits of a candidate can triumph over racial considerations in increased white support of minority representatives in certain elections. *Id.* Unfortunately, however, the typical circumstance illustrates that "the battle to overcome entrenched habits of racially polarized voting is far from over." *Id.*

anonymity can serve the positive role of exploiting the platform of colorblind advocates by conducting an election which is just that—blind to color.

III. A Colorblind Electoral Model

A. The Proposal

Consider how an electoral system would be structured to conduct an election in a strictly colorblind manner, for instance, an at-large election for a multi-member governing body. Though generally the system should strive to be one in which the outcome of an election turned solely upon the pure preferences of the voters, precisely what procedures should be implemented to subordinate race through the entire process? The utilization of constructive anonymity provides the foundation for such a system.

To begin with, each person who wishes to run for a position would announce her intent by registering with the jurisdiction's election commission, at which time each would be assigned a number. The assigned numbers would be the sole means of referring to the candidates in all instances throughout their campaigns and the election. As such, the identity of each candidate would remain unknown to voters so that characteristics of race, gender, party affiliation, economic status and other distinguishing, potentially vote-influencing, traits would not enter the contest.[86] Each candidate, however, would be allowed to know the identity of its opponents. Any candidate that revealed her identity or the identity of one of her opponents would be disqualified. The goal would be to place all candidates on the same level, distinguished only by how each stood on a particular matter.

All methods of campaigning would be regulated to a certain degree. Each candidate's platform would consist of its stance and underlying policy on issues particular to the jurisdiction. Campaign literature would only contain information about the candidate's platform, identified only by the

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[86] *See supra* notes 72, 83 and accompanying text.

candidate's number. Such literature would be produced in equal quantities, distributed at the same locations, and presented in the same format. Radio spots would have each candidates' message presented in the same voice. Television advertisements,[87] speeches and debates would do the same, the only limitation being that the physical appearances of the candidates could not be revealed.[88] No candidate would have more radio or television time than the other, and the frequency with which each is heard or seen would be the same for all. The content of the advertisements would not be restricted as long as the candidate maintained his anonymity and the anonymity of his opponents.[89] The money used to fund each candidate's campaign could come from a common pool, such as one generated through contributions to a public fund, which would be divided equally among the candidates.

On election day, each voter would vote affirmatively, negatively, or abstain on each issue. Instead of having the option of voting for a single candidate, each ballot would contain a list of determinative issues, similar in content to those matters which comprise each candidate's platform. The winners would be determined by how many of the candidate's position on issues aligned with the issues receiving the most number of affirma-

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[87] *See generally* Keith Darren Eisner, Comment, *Non-Major-Party Candidates and Televised Presidential Debates: The Merits of Legislative Inclusion*, 141 U. PA. L. REV. 973, 997-1002 (1993) (discussing impact of television exposure in election campaigns). Research reveals that television advertisements which omit visual or aural enhancements and other additional images are more informative in presenting a candidate's position on issues. Timothy J. Moran, *Format Restrictions on Televised Political Advertising: Elevating Political Debate Without Suppressing Free Speech*, 67 IND. L.J. 663, 678 (1992).

[88] Moran, *supra* note 87, at 666. Political advertisements tend to focus much more on the personal attributes of candidates instead of public policy preferences. *Id.* Voters' ability to participate in government through the mechanism of voting is diminished if they cannot perceive each candidate's policy choices. *Id.* at 672.

[89] There would be no First Amendment issues implicated here as content would not be sought to be regulated; nor would First Amendment rights be infringed upon by the anonymous requirements as the controversy has been over legislation which has sought to prohibit anonymous literature, not promote it. *See* McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1524 (1995) (invalidating prohibition on anonymous campaign literature); Talley v. California, 362 U.S. 60, 64-65 (1960) (ruling against ban on anonymous handbills).

tive votes from the voters.[90] Thus, when the votes are tallied, the numbers would reflect voter preferences which would in turn be used to place candidates in the available seats.[91] Once in office, the positions each candidate adopted on the issues would be the positions it would be expected to assume throughout the term. These positions could not be abandoned without sufficient justification to those represented. Additionally, a winning candidate would be expected to incorporate and reconcile their positions with those interests that did not receive a majority vote[92] when making decisions that affect the

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[90] See Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 251-57, for descriptions of "alternative voting systems" which rest on similar principles. Under the proposed model, for example, if seven candidates were running for three seats and the ballot contained fifteen issues, the candidate whose platform on the issues paralleled voter preference on all issues would be the top winner and would definitely gain one of the seats. If another candidate paralleled voter preference on twelve issues but none of the other candidates fared better, this candidate could win one of the seats. Finally, the last seat would go to the candidate who matched twelve or less but more than the remaining candidates. Consequently, this process would depend a great deal on how the issues are chosen and presented, in one sense, similar to deciding issues by referendum or initiative. *Cf. id.* (discussing cumulative, limited, and preference voting).

[91] *See* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 172, 213 (1989) [hereinafter *Maps and Misreadings*] (discussing cumulative voting). This system is related in some aspects to cumulative voting because it allows voters to "express the intensity of their preference." *Id.* A voter's affirmative vote on the issues it prefers is akin to the equal allocation of a voter's votes among its choices in cumulative voting. *See* Edward Still & Robert Richie, *Modified At-Large Voting Systems as Voting Rights Remedies*, *in* COMMUNITIES & THE VOTING RIGHTS ACT: A GUIDE TO COMPLIANCE IN THESE CHANGING TIMES, *supra* note 5, at 93-94.

[92] *Minority Interests*, *supra* note 83, at 443. Winner-take-all elections ultimately give all of the power to the person who gets the majority of the votes. *Id.* at 439. Perhaps "[t]he majority should enjoy a majority of the power; but the minority should also enjoy some power too." *Id.* at 443. At a very basic level, voters participate in order to have a voice in their government, a concern primary over the mere fact of winning and the absence of which often produces "voter disinterest." *Id.* at 439, 449. Winner-take-all systems thus tend to impede the recognition of minority interests. *See* Eisner, *supra* note 87, at 990 (remarking on failure of winner-take-all schemes to "reward second- or third-place finishers, thereby discouraging minor-party participation); William R. Kirschner, Note, *Fusion and the Associational Rights of Minor Political Parties*, 95 COLUM. L. REV. 683, 700 (1995) (recognizing obstacle that winner-take-all elections pose to minor interest groups).

entire community,[93] in which instance sufficient justification for a modification in position would definitely be found. Those that did not comply could be ousted from their positions which would be subsequently filled by the candidate who was next in line for a position.

B. The Consequences

What would be the consequences of implementing such an electoral process? Could a model that procedurally eliminates the factor of race but equates the power of one vote with that of another fulfill the goals of both colorblind critics and advocates? The colorblind model described herein possesses features enumerated below that respond positively to a number of current issues.

First, the model has the potential to avoid the circumstances which foster vote dilution by allowing each vote to exist in its most basic form. It could realize the "one person, one vote" theory, by providing the environment to permit each vote to retain its unmanipulated and undiluted power to affect election outcomes. Inherent in this may be a remedy to voter apathy[94] as it could likely encourage enthusiasm at the polls when each voter sees how directly his or her vote could influence election results.

Second, candidates could be judged on their policies and merit. Placing substantive responses to issues over voter prejudices and biases could result in a governing body which consists of different races, genders, and economic classes. While a representative who shares the same race as those it represents may better understand the issues specific to them, more may be required at times for the represented's concerns to have an impact on the representative's decisionmaking.[95] The addition-

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[93] *Minority Interests*, *supra* note 83, at 440-41. Just because majority opinion tends to favor a particular decision does not necessarily mean that the decision is the appropriate policy choice for the community. *Id.; see* Luis Fuentes-Rohwer, *The Emptiness of Majority Rule*, 1 MICH. J. RACE & L. 195, 235-36 (1996) (recognizing majority choice is not always "well meaning" and "toward public good").

[94] *See supra* notes 88, 92 and accompanying text.

[95] *See The Triumph of Tokenism*, *supra* note 71, at 1116-30 (recognizing that

al validation would occur when representatives realize that issues may be group-based and not necessarily race-based.

Third, the model could facilitate the potential for legislation which is more responsive to all of the voters, in that a greater number of different needs would have to be addressed. Though in the model, the opinions of the majority are instrumental in selecting the candidates, these opinions would not result in the typical "winner-take-all" mentality that often tends to suppress the interests of the minority.[96] Those decisions on the issues which did not yield the most votes would not necessarily be characterized as pure minority losses in that there would be more opportunity for certain groups of like interests to not lose all to the majority as they would be in a better position to have at least some of their issues prevail. The majoritarian form of government incorrectly assumes that majority preferences are always inherently the best rules to govern the society.[97] If representatives are required to consider the views of those that did not align with their positions, this forced cooperation may result in enlightened perspectives and progressive legislation.

Fourth, it removes some of the problems associated with defining the boundaries of voter districts and the skepticism about their role in effecting political equality.[98] Since the criterion of anonymity guarantees that the "result of the election is the same under all possible distributions of the voters among the positions in the structure of the election system,"[99] the existence of districts begins to suggest a different purpose. No longer would the configuration of districts be so influential in how votes are weighted;[100] instead, the process of determining

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election of black officials does not necessarily "translate into intergroup cooperation" among races).

[96] *See supra* notes 92, 93 and accompanying text.

[97] *See supra* notes 92, 93 and accompanying text.

[98] Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 903 (1995). Our current system of "preconfigured geographic units" should not serve as important a role in evaluating the baseline of representation. *Id.* Further, using district configuration as a measure of equal representation constrains the principle of voter autonomy. *Id.*

[99] Still, *supra* note 78, at 382.

[100] *See Maps and Misreadings*, *supra* note 91, at 199-213 (discussing role of

district boundaries could focus on how to effectively manage the collection of the individual vote, undistorted and unmanipulated by district gerrymandering activities.

Fifth, it facilitates the notion of accountability. Winning candidates do not always pay attention to the interests of those which they utilized to obtain success in the election.[101] Because the scheme requires that elected persons justify any change in position to the represented, representatives would have to be more aware of the impact of their decisions. Not only would this provide the governed the power to affect decisionmaking by establishing a direct link between the governing and the governed, an interest which may previously have been subordinated, but the governed would also not have to wait until the candidate's term expired to voice dissatisfaction. Moreover, it would also serve as a check on the legitimacy and sincerity of a candidate's position, thereby preventing a candidate from winning and holding a seat under pretext.

Additionally, the model offers an opportunity for the self-identification and self-articulation of subgroups within a governed group. Though the debate over individual rights versus group rights is not yet resolved, it provides one answer to the question of how such groups are to be differentiated within the mass of voters, in direct response to questions previously posed by members of the Court on how to deal with the "difficulty in determining" the classification of groups.[102] Within this model, these subgroups would be self-articulating by expressing their positions on issues which would result in a better chance to allow them recognition.[103]

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districting in vote dilution claims). "[D]istricting may not materially affect the degree of [minority] inclusion on governing bodies." *Id.* at 221.

[101] Chandler Davidson, *Minority Vote Dilution*, in MINORITY VOTE DILUTION 5-10 (Chandler Davidson ed., 1984). For instance, minority interests are often nullified after a winning candidate assumes his position due to post-election pressure from white constituents. *Id.*; *see The Triumph of Tokenism*, *supra* note 71, at 1116-30 (recognizing that election of black officials does not necessarily "translate into intergroup cooperation" among races).

[102] Phillips, *supra* note 71, at 584 (citing City of Mobile v. Bolden, 446 U.S. 55, 78-79 n.26 (1980)).

[103] Lani Guinier, *More Democracy*, 1995 U. CHI. LEGAL F. 1, 15-16 [hereinafter

Finally, the identification of groups would also relieve voters from having their concerns suppressed by not having to struggle to voice them within the larger group setting of one of the dominant political parties in this country. Since voters are virtually offered only two choices as far as political affiliation is concerned,[104] the association with one or the other constructively forces a voter to adopt many of the party's positions on policies, whether or not the voter agrees with all of them. The potential for a group of voters to voice items of their agenda and have them recognized lessens as many of them are consumed within the agenda of the party. The colorblind model's focus disables this occurrence by providing the potential for the greater recognition of other political parties and decreasing the monopoly that the dominant two possess.

C. The Reactions

With all of the potentially positive aspects that are attributable to this electoral model, it is one that still would likely not be embraced by colorblind advocates. This prediction rests upon the reaction of majoritarian conservatives to other mechanisms which offered the chance for minorities to gain equal footing in the political arena. For instance, it was not by accident that the passage of the Voting Rights Act encountered such massive resistance when conservatives saw that it would not only bring more black voters to the polls but also provide them the chance to meaningfully affect election outcomes.[105] Nor was it coincidental that after formal barriers to voting were eliminated, other subtle means were developed to circumvent the mandates of the Voting Rights Act to prevent minority

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More Democracy]. Guinier characterizes this as allowing "voters the choice to district themselves." *Id.* at 15.

[104] Note, *Fusion Candidacies, Disaggregation, and Freedom of Association*, 109 HARV. L. REV. 1302, 1302 (1996). A large segment of American voters are "dissatisfied with the choices presented by the two major political parties." *Id.*

[105] *See supra* note 17 and accompanying text. In fact, the state of Mississippi exhibited the greatest hostility to the Voting Rights Act than any other southern state. *See supra* note 17 and accompanying text.

participation in government,[106] practices which are still in force today and frequently challenged in our courts.[107] Lest reliance be placed in the hands of our current Supreme Court to resolve the particular issues presented herein, the objectives of some of its members are also subject to question.[108] Even current activity in areas other than voting reflect the antagonistic view many hold towards remedial efforts to "level the playing field."[109] Thus, to colorblind advocates, this model would likely appear overly responsive and painfully exaggerated, although its features are precisely what they proclaim represents the best alternative to dealing with race. Ironically, when their bluff is called, when presented with exactly what they have been asking for the true colors of colorblind advocates would rise to the surface,[110] revealing the fact that they are not prepared to face the consequences of all persons being considered on an even keel.[111] Those who deny this fact tend to label as "progress" and "reform" isolated political victories that members of the minority have obtained in recent years, arguing that because the problem has been addressed, we as a country can proceed with legislation that does not consider race.[112] Moreover, a strict colorblind model would interfere with the "perpetuation of white supremacy" and the status quo which conservatives have taken great pains to keep intact.[113]

For reasons beyond the fact that it directly conflicts with

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[106] *See supra* note 17 and accompanying text.

[107] *See supra* notes 7, 16, 68 and accompanying text.

[108] *Racial Discourse*, *supra* note 19, at 603, 620 n.18. While blatant expressions no longer indicate extreme conservative views on the Court, the reluctance to address the interests of minorities reveals a subtle hostility and ignorance of minority interests. *Id.* at 609-20. *See also supra* notes 62, 63 and accompanying text.

[109] *See supra* note 17 and accompanying text.

[110] *See supra* notes 13, 16, 17, 19, 21, 73, 76 and accompanying text.

[111] *See supra* note 77 and accompanying text.

[112] *See* Stephen Reinhardt, *Remarks at UCLA Law School Forum on Affirmative Action: "Where Have You Gone Jackie Robinson?"*, 43 UCLA L. REV. 1731, 1733 (1996) (recognizing existence of myth that "war against racism is over" because "[c]olorblind in law is not colorblind in fact"); *see also supra* notes 16, 17, 19, 21 and accompanying text.

[113] Raskin, *supra* note 27, at 744.

their solution to achieving political equality, this model would also probably not be acceptable to those proponents who urge the consideration of race in achieving electoral fairness. To colorblind critics, this extreme version of color ignorance would support the absurd assumption that racism will voluntarily cure itself if totally avoided.[114] Since the current concept of colorblindness facilitates "submerg[ing] the votes of those whom the Fourteenth and Fifteenth Amendments were adopted to protect,"[115] the model's literal form would act as a catalyst to subjugate distinct cultural differences into a non-dynamic, non-eclectic mass.[116] Further, since all race-related characteristics would be eliminated for election purposes, racial identity would be discounted as without value or worth in our society.[117] Colorblind critics would assert that the model inappropriately simplifies the complexities of race and ignores the positive aspects of race recognition, such as its empowering and mobilizing effects.[118] Because colorblind dissenters would find the cost of equality at too high a price, like colorblind advocates, they too may be reluctant to adopt the model as a pragmatic solution to dealing with race in voting contexts, thus leading us no closer to responding to the agendas of either group's position.

IV. CONCLUSION

The conservatives' promotion of a colorblind society can be classified as nothing more than rhetoric; in essence, a bluff, the message of which impressionable members of our society and members of the Court have ingested and the consequences of which this country cannot afford because it leads us no closer to resolving race issues in the election process. Neutral policies which ignore existing imbalances cannot be successful until some semblance of equilibrium is achieved to make these poli-

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[114] Turner, *supra* note 16, at 114.
[115] Bush v. Vera, 116 S. Ct. 1941, 2010 (1996) (Souter, J., dissenting).
[116] *See supra* note 24 and accompanying text.
[117] *Color-blind Vision*, *supra* note 24, at 1140-41.
[118] *More Democracy*, *supra* note 103, at 5-6.

cies truly fair to everyone. Similarly, "[p]rivate prejudices, to be sure, cannot be eliminated overnight."[119] While the presented model of a colorblind electoral scheme does not attempt to cure these prejudices and itself contains some inherent problems, it could serve to erode stereotypical opinions on race matters and enlighten those who embrace majoritarian, unicultural views about the qualifications of members of our multicultural society by providing a means to discover that generally, our needs may not be so different. The object is to get to the point where race does not matter or, at least, where it does not matter over merit. Change is not easy to confront but neither is racism. If we realize that our country will have to go through some type of transition from its existent system of prejudices to a more enlightened position on race and merit, the transition will certainly be welcome. The error in continuing to advance incorrect semantic interpretations of colorblindness on our impressionable, prone-to-rhetoric society is one that we cannot afford to ignore.

> The sooner we get down the road toward accepting and being a part of the real world, and not shutting it out and away from us, the sooner will these difficulties vanish from the scene. . . . In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.[120]

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[119] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 416 (1978) (quoting 110 CONG. REC. 7063-64 (remarks of Sen. Pastore)). Racial considerations in policymaking do not threaten the pursuit of fairness but rather encourages conversation about the realities of our social structure. *See supra* note 23.

[120] *Bakke*, 438 U.S. at 407 (Blackmun, J., writing separate opinion).

As for advocates of colorblindness who persist in the correctness of their rhetorical views, one can only advise that they be careful what they ask for.[121]

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[121] See James Baldwin, *In Search of Martin Luther King, Jr. in* VOICES IN BLACK AND WHITE 101, 121 (Franklin Square Press 1993) for an insightful comment in 1961 on the delicacy of the resolution of race relations in this country, stating, "[W]e are certain, as we begin history's strangest metamorphosis, to undergo the torment of being forced to surrender far more than we ever realized we had accepted."

ACHIEVING THE BEST TAX TREATMENT FOR YOUR PHYSICAL INJURY CLIENT'S SETTLEMENT AWARD

I. INTRODUCTION

During settlement negotiations,[1] the goal of a plaintiff's attorney is usually to attain as high a damage award as possible. However, with the high tax liabilities that can attach to those awards, an attorney's duty also extends to minimizing the taxable character of the settlement.[2] A fully taxable award is worth only two-thirds the value of a nontaxable settlement.[3] An attorney should therefore allocate settlement amounts away from taxable damages as much as possible. In addition, the attorney must have taken steps during the litigation process to ensure the settlement will be respected by the Internal Revenue Service and the courts. This comment will provide guidance for achieving the best tax treatment of a settlement, first by discussing the taxable character of various types of damages. It will also examine the judicial response to controversies between taxpayers and the Service on the taxable nature of settlement awards, focusing upon the factors courts find persuasive. Finally, the comment will discuss specific steps practitioners can take to minimize a client's tax liability.

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[1] Over ninety percent of cases settle prior to trial. Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1096 (1996).

[2] Robert E. Elwood, *Plan the Tax Results of Your Settlements and Judgments*, 1 PRAC. LIT. 23, 35 (1990) ("Full service to your client demands that you . . . think about tax consequences and consider how you will characterize awards and settlements amounts.").

[3] I.R.C. § 1 (1997).

II. THE STATUTORY EXCLUSION OF PHYSICAL INJURY DAMAGES

Compensation for personal injuries has been exempt from gross income[4] since the adoption of the Internal Revenue Act of 1918.[5] Although the rationale for the original legislation is unclear, there appears to have been a belief that tort awards merely compensated the taxpayer for a loss of capital, that capital being either his body[6] or his earning ability.[7] Amounts received for personal injuries were excludable because they were not derived from the appreciation of capital, but were instead compensation for a loss which impaired the taxpayer's capital.[8]

In its present form, the exclusion is contained at section 104(a)(2) of the Internal Revenue Code and excludes from gross income "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal

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[4] The Internal Revenue Code defines "gross income" as "all income from whatever source derived." I.R.C. § 61 (1997). The Supreme Court has characterized "income" as "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955). While "gross income" is to be interpreted broadly, statutory exclusions from income must be narrowly construed. United States v. Centennial Sav. Bank FSB, 499 U.S. 573, 583 (1991).

[5] I.R.C. § 213(b)(6) (1918). The 1918 statute provided that gross income did not include "[a]mounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness." *Id.*

[6] S. 1384, 2 C.B. 71, 72 (1920). The drafters may have felt that since recovered damages only served to make the taxpayer whole, the taxpayer realized no gain on the conversion of his capital. Leandra Lederman Gassenheimer, *The Excludability of Employment Discrimination Awards under Code Section 104(a)(2) after* Burke v. United States *and* Commissioner v. Schleier, 28 ARIZ. ST. L.J. 315, 317 (1996).

[7] In a report to the Secretary of the Treasury, the Attorney General in 1918 advised that proceeds derived from an accident should be nontaxable because they primarily "substitute . . . capital which is the source of future periodical income . . . merely tak[ing] the place of capital in human ability which was destroyed by the accident." 31 Op. Att'y Gen. 304, 308 (1918).

[8] Clark v. Commissioner, 40 B.T.A. 333, 335 (1939).

physical injuries or physical sickness."[9] Emotional distress is not to be treated as a physical injury or physical sickness, although the portion of any emotional distress recovery actually used to pay for the medical care of injuries caused by emotional distress is exempt from taxation.[10] Punitive damages are likewise generally includable in income.[11]

In addition to the express language of section 104(a)(2), to be excludable from taxable income, damages must meet certain requirements developed by the United States Supreme Court. In *United States v. Burke*,[12] the Court stated that the underlying action must be based upon tort type rights.[13] The primary characteristic of such rights is the availability of broad types of compensatory remedies.[14] Further, the Court in *Commissioner v. Schleier*[15] said the taxpayer must establish that the damages were received "on account of" a personal injury, meaning a causal connection must exist between the personal injury and the damages received.[16] Because both

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[9] I.R.C. § 104(a)(2) (1997).

[10] I.R.C. § 104(a) (1997).

[11] The drafters felt punitive damages are intended to punish the wrongdoer, and should be included in taxable income because they provide a windfall to the recipient. H.R. CONF. REP. NO. 104-737, at 115 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1474, 1589. Punitive damages are excludable under claims that allow only punitive damages according to state law in effect on September 13, 1995, or when those punitive damages are the result of a wrongful death action. I.R.C. § 104(c) (1997).

[12] 504 U.S. 229 (1992).

[13] *Burke*, 504 U.S. at 237. The Court cited IRS regulations that expressly linked the § 104(a)(2) exclusion to "prosecution of a legal suit or action based upon tort or tort type rights." *Id.* at 234 (*quoting* Treas. Reg. § 1.104-1(c) (1991)).

[14] *Id.* at 235. Compensatory remedies in tort type actions include not only reimbursement for monetary loss, but also damages for intangible elements of injury such as pain and suffering, emotional distress, and humiliation. *Id.* at 235-36. The Court ruled that damages under a Title VII sex discrimination suit were not excludable because Title VII limited the available damages to lost wages. *Id.* at 241-42.

[15] 515 U.S. 323 (1995).

[16] *Schleier*, 515 U.S. at 329-30. The Supreme Court gave as examples of sufficient causal connections the victim of an auto accident who cannot work on account of his injuries and for that reason is awarded an amount of lost wages, and a surgeon who loses future income on account of a severed finger. *Id.* The Court refused to allow a taxpayer to exclude his recovery under the Age Discrimi-

Burke and *Schleier* were decided under earlier versions of section 104, their current relevance is questionable.

The current structure of section 104 is relatively new, applying only to those settlement amounts received on or after August 21, 1996. Consequently, there is currently little judicial guidance for which damages are excludable and which are not. However, because of the requirement of a physical injury of some type, it seems apparent that torts such as libel, slander, intentional infliction of mental anguish, invasion of privacy, malicious prosecution, denial of first amendment rights, and alienation of affections are not within the exclusion.[17] Congress failed to define the extent of the "physical injury" needed to satisfy the section 104(a)(2) exclusion. Therefore, while damages for sexual harassment resulting from a boss's suggestive comments about his secretary's appearance are includable, damages for sexual harassment stemming from a boss fondling his secretary may arguably fall within the exclusion.[18] Further, when there is a physical injury, all damages flowing from that injury will be excludable, including lost wages.[19]

For amounts received before August 21, 1996, a different standard is employed to determine the excludability of damages.[20] Although this previous standard will not be discussed in

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nation in Employment Act because he did not recover damages for an injury or sickness. *Id.* at 330-31.

[17] Apparently all awards for "dignitary torts" are now includable in taxable income. J. Martin Burke & Michael K. Friel, *Getting Physical: Excluding Personal Injury Awards under the New Section 104(a)(2)*, 58 MONT. L. REV. 167, 178-79 (1997).

[18] *Id.* at 185-87.

[19] H.R. CONF. REP. NO. 737, at 142 (1996) ("If an action has its origin in a physical injury, then all damages (other than punitive damages) that flow therefrom are treated as payments received on account of physical injury or physical sickness.").

[20] On August 20, 1996 President Clinton signed the Small Business Job Protection Act of 1996, significantly altering the wording of section 104(a)(2) of the Internal Revenue Code. Small Business Job Protection Act of 1996 § 1605, Pub. L. No. 104-188, 110 Stat. 1838. Prior to this change, the statute excluded from taxable income "the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal

this comment, it should be noted that in some of the cases cited the damages that were exempt at the time of the decision would not be exempt under the new structure of section 104.

The allocation of damages is important whenever a plaintiff sues under a bundle of rights, of which some are taxable and some qualify for the statutory exemption. Allocations are also important where the settlement amount includes a possible punitive damages component. The plaintiff will of course want to allocate no more than necessary to taxable nonphysical and punitive damages. A plaintiff may have an additional incentive for wishing to allocate away from exemplary damages in states that require a portion of punitive damages be paid to the government.[21] But these allocations will be useless if the Service and the courts do not respect the settlement agreement. A study of court cases involving the legitimacy of settlement allocations gives clues to what is needed for an agreement to be respected.

III. JUDICIAL RESPONSE TO ALLOCATION CONTROVERSIES

When the Internal Revenue Service challenges a taxpayer's characterization of a settlement award, the Service's determination is presumed to be correct[22] and this

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injuries or sickness." I.R.C. § 104(a)(2) (1996). This language created much confusion concerning the taxation of many types of damages, especially where nonphysical and punitive injuries were concerned. The Supreme Court in 1996 ruled that because punitive damages "do not compensate for any kind of loss," they must be included in income even when the damages were received prior to August 21, 1996. O'Gilvie v. United States, 117 S. Ct. 452, 456 (1996).

[21] *See e.g.*, FLA. STAT. ANN. § 768.73(2) (1997) (35% of punitive damages award payable to state fund); MO. ANN. STAT. § 537.675 (1997) (50% of punitive award to be constructively rendered in favor of state); Gordon v. State, 608 So. 2d 800, 801-02 (Fla. 1992) (upholding constitutionality of statutes requiring portion of punitive damages be paid to states), *cert. denied*, 507 U.S. 1005 (1993).

[22] T.C. RULE 142(a). Although the presumption in favor of the Service is embodied in Tax Court Rules, the presumption has been extended to other federal courts, including the United States Supreme Court. *See, e.g.* United States v. Janis, 428 U.S. 433, 440-41 (1976) (noting that burden of proof which prevails in usual preassessment proceeding in the Tax Court is also applicable in civil collection suit instituted by the Government). The presumption requires that the tax-

presumption generally does not shift.[23] The taxpayer must affirmatively prove by a preponderance of the evidence that the tax deficiency assessment is erroneous.[24] Courts faced with these controversies have focused upon numerous, though not always consistent, factors to determine the proper taxable character of the settlement damages. These cases have fallen roughly into two categories: (a) those cases in which the settlement allocates the damages and the Service challenges the validity of those allocations; and (b) suits in which no allocation was made in the settlement agreement and the court is faced with deciding how to now prorate the settlement amount.

A. Settlement Agreements that Allocate Damages

In determining the proper allocation of a settlement award, the most important factor is the intent of the payor.[25] The strongest evidence of the intent of the payor is usually an express allocation in the settlement agreement.[26] However, a

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payer affirmatively prove his case. Dick Bros., Inc. v. Commissioner, 205 F.2d 64, 67 (3d Cir. 1953).

[23] United Airline Co. v. Commissioner, 316 F.2d 701, 704 (1st Cir. 1963). Taxpayers will admittedly have a difficult time overcoming the presumption in favor of the Service. *Id.*

[24] Estate of Whitt v. Commissioner, 751 F.2d 1548, 1556 (11th Cir. 1985). Preponderance of evidence is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it. Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1204 n.3 (D.D.C. 1990).

[25] *See*, Knuckles v. Commissioner, 349 F.2d 610, 613 (10th Cir. 1965) ("[T]he most important fact in making that [allocation] determination . . . is the intent of the payor as to the purpose in making the payment."); Agar v. Commissioner, 290 F.2d 283, 284 (2d Cir. 1961) (holding that determination of defendant's purpose in making the payment is the "ultimate inquiry"). The court must determine in lieu of what was the payment made. Church v. Commissioner, 80 T.C. 1104, 1107 (1983). In ascertaining the intent of the payor, the understanding of the injured party is of little consequence. Britell v. Commissioner, 69 T.C.M. (CCH) 2904, 2907 (1995). The validity of the claim or claims is similarly of no importance. Woodward v. Commissioner, 397 U.S. 572, 576-77 (1970). *See also* Seay v. Commissioner, 58 T.C. 32, 37 (1972) (finding that taxpayer does not have to show validity of claim, but rather must show nature of claim which was basis of settlement).

[26] Metzger v. Commissioner, 88 T.C. 834, 847 (1987), *aff'd*, 845 F.2d 1013 (3d

court will not be bound by this language when the court feels the agreement's allocations do not reflect the true substance of the settlement, but were instead made for the purpose of tax avoidance.[27] If the court rejects the allocations in the agreement, the court itself will allocate the amounts that are in settlement of each individual claim.

The recent case of *McKay v. Commissioner*[28] shows the relative deference given to allocations in settlements. The taxpayer in *McKay* had sued his former employer in the underlying action after being fired for refusing to make an illegal bribe.[29] The causes of damage at the time of trial were wrongful discharge, RICO violations, and breach of contract.[30] The jury awarded the taxpayer $43 million for violations of RICO and punitive damages totalling $1.25 million.[31] After subsequent settlement negotiations, the parties settled for approximately $16.7 million, allocating $2 million to the breach of contract claim (which was taxable), $2.5 million for reimbursement of legal expenses (taxable), and $12.2 million to the wrongful discharge tort claim (nontaxable).[32] The Ser-

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Cir. 1988). "[E]xpress language in a settlement agreement is the most important factor in deciding whether a payment was made on account of a tortious personal injury for purposes of exclusion under § 104(a)(2)." McKay v. Commissioner, 102 T.C. 465, 482 (1994), *vacated,* 84 F.3d 433 (5th Cir. 1996).

[27] Delaney v. Commissioner, 99 F.3d 20, 24 (1st Cir. 1996). In *Delaney*, a jury awarded the taxpayers $175,000 (61%) for personal injuries and $112,000 (39%) for prejudgment interest. *Id.* at 22. The interest would have been taxable. *Id.* The parties subsequently settled, with a stipulation of "no interest." *Id.* The court felt the choice of settlement language was driven by tax considerations. *Id.* at 24. Probing beyond the settlement terms, the court found the jury verdict indicated that 39% of the settlement should be allocated to prejudgment interest. *Delaney*, 99 F.3d at 26.

[28] 102 T.C. 465 (1994), *vacated without published opinion,* 84 F.3d 433 (5th Cir. 1996).

[29] *McKay*, 102 T.C. at 468-69. The taxpayer had been an officer in the defendant's oil acquisition business. *Id.* at 468. His employer ordered him to transfer a $1.5 million bribe to an Oman official, in violation of the Foreign Corrupt Policies Act. *Id.* Refusing to engage in the illegal activity, the taxpayer was discharged. *Id.* at 469.

[30] *Id.* at 470.

[31] *Id.* at 471. The RICO damages were a $12.8 million award by the jury for "future" damages and an award of $1.6 million for lost compensation. *Id.* These damages were trebled by the RICO statute. *Id.*

[32] *Id.* at 471-74. The allocation between tort and contract damages was alleg-

vice challenged this allocation, claiming the settlement agreement should be disregarded and the total $16.7 million included in the taxpayer's gross income.[33]

The court in *McKay* ruled for the taxpayer, respecting the allocations of the settlement agreement.[34] The court focused upon the relationship between the parties during the settlement process, stating that in order for the settlement allocations to be respected, "the express allocations must be negotiated at arm's length between adverse parties."[35] During negotiations, the defendant had refused to settle if any damages were allocated to the RICO claim, while the plaintiff had wanted the defendant to be punished, both in the amount of settlement and in the admission of RICO violations.[36] Another factor strongly in the taxpayer's favor was the close involvement of the trial court judge in the settlement negotiations.[37] Moreover, the final settlement agreement allocations were consistent with the entire record.[38] The taxpayer's pleadings reflected that the lawsuit was for primarily nontaxable tort damages, with the taxable contract component a minor part of the suit.[39] Because the parties to the settlement acted in good faith, creating an agreement that properly reflected the realities of the lawsuit and settlement negotiations, the court upheld the taxpayer's allocations.[40]

Despite the weight given to the express terms of a settle-

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edly based on estimates of appellate success, the jury verdict, and the approximate value of the claims. *Id.* at 472.

[33] *Id.* at 474.

[34] *McKay*, 102 T.C. at 487.

[35] *Id.* at 482. The decision noted that while the express language of a settlement is the best indication of the intention of the parties, the court would not feel bound by the settlement or any other factor that was inconsistent with the true substance of the agreement. *Id.*

[36] *Id.* at 484.

[37] *Id.*

[38] *Id.*

[39] *McKay*, 102 T.C. at 484.

[40] *Id.* at 487. The court also rejected the Commissioner's argument that since both the tort and contract payments were deductible the defendant was indifferent to the allocation of the settlement. *Id.* at 485. While deductibility of settlement payments is a factor, it is not determinative. *Id.*

ment agreement, a court will in proper circumstances disregard the terms of the agreement and allocate the damages on its own. A classic example is *Robinson v. Commissioner*,[41] decided only eight weeks prior to the *McKay* case. After a jury in the underlying suit awarded the taxpayers nearly $60 million, including $50 million in taxable punitive damages, the parties in *Robinson* settled for $10 million.[42] The settlement agreement provided that 95% of the settlement would be allocated to nontaxable mental anguish and the other 5% to punitive damages.[43] As in *McKay*, the Tax Court said the settlement allocations would be respected only if the settlement was "entered into by the parties in an adversarial context at arm's length and in good faith."[44] The court determined the defendant was not concerned with the allocations, but instead allowed the plaintiffs to allocate with a view towards federal income taxes.[45] The court rejected the taxpayers' argument that the allocations should be upheld because the settlement agreement was entered by the presiding state judge.[46] While the decree of a lower state court should be attributed some weight, that decree will not be controlling where the trial judge, as here, merely rubber stamped the allocations of the parties.[47] An additional factor was that the agreement, on its

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[41] 102 T.C. 116 (1994), *aff'd in part, rev'd in part*, 70 F.3d 34 (5th Cir. 1995).

[42] *Robinson*, 102 T.C. at 121-22. The taxpayers were eager to settle because they wanted to receive their recovery quickly and feared an appellate court would characterize the $50 million punitive damages as the result of a "runaway jury." *Id.* at 122.

[43] *Id.* at 123. As part of the settlement negotiations, the defendant agreed to work with the taxpayers in structuring the settlement in a way that would minimize income taxation. *Id.* at 124. The defendant was indifferent to the manner in which the damages were allocated. *Id.*

[44] *Id.* at 127. *See also* Mitchell v. Commissioner, 60 T.C.M. (CCH) 1368, 1378 (1990) (refusing to honor settlement allocation when taxpayer drafted agreement without participation of defendant), *aff'd*, 992 F.2d 1219 (9th Cir. 1993).

[45] *Robinson*, 102 T.C. at 131-32. A settlement drafted solely with a view towards avoiding federal income taxes does not properly reflect the substance of the actual settlement. *Id.* at 133.

[46] *Id.* at 129-30.

[47] *Id.* at 132. The taxpayer had argued that the federal court was precluded from reallocating the settlement damages because the state trial judge had approved the settlement agreement. *Id.* at 129. The court responded that it was

face, appeared to have been a severe overreaching by the taxpayers.[48] For example, the taxpayers attempted to allocate to mental anguish an amount sixteen times the actual damages suffered.[49] Because the settlement agreement was drafted to avoid taxation, the court reallocated the settlement to reflect what it believed to be the realities of the agreement.[50]

B. Settlement Agreements that Fail to Allocate Damages

When parties have failed to make any allocation in their settlement agreements, courts have taken two decidedly different views. In the more lenient cases, the court itself allocates the lump-sum settlement.[51] This determination is very similar to the analysis used when a court rejects the allocation terms in a settlement agreement.[52] The courts will look at

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only required to give "proper regard" to allocations approved by the state courts. *Id.* at 132 (*citing* Commissioner v. Estate of Bosch, 387 U.S. 456, 463-64 (1967)). *See also* Priv. Ltr. Rul. 8437084 (June 13, 1984) (holding that written finding of judge supervising the settlement of lawsuit is relevant factor, but not conclusive one). The parties in *Robinson* came to the trial judge's house with the settlement, and the judge entered the judgment agreed to by the parties without making an independent review. *Robinson*, 102 T.C. at 129. Because the judge did not make an independent review, the "proper regard" given to his role did not control in the final determination. *Id.* at 132.

[48] *Id.* at 133-34. Even though the jury award of $59 million included $50 million in taxable punitive damages, the taxpayers attempted in their settlement agreement to exclude 95% of the damages. *Id.* at 121-23.

[49] *Id.* at 134 n.22.

[50] *Robinson*, 102 T.C. at 134-35. The court chose not to follow exactly the allocation made by the jury in its award, for the $50 million punitive damages were likely the result of a runaway jury and would be reduced upon appeal. *Id.* at 134. Therefore, the court allocated the $10 million settlement payment first to the jury's award of contract and tort damages, and the remaining balance to punitive damages. *Id.* at 134-35. The taxpayers were allowed to exclude only 37% of the $10 million payment. *Id.* at 135.

[51] *See, e.g.*, Matray v. Commissioner, 56 T.C.M. (CCH) 1107, 1111 (1989) (determining by examination of facts that approximately half of lump sum settlement was attributable to nontaxable personal injuries and half to taxable breach of contract).

[52] A court will again look at all relevant evidence to determine in lieu of what the damages were awarded, examining "the details surrounding the litigation in [the underlying] proceeding, the allegations contained in the payee's complaint there, and the arguments made in the proceeding by each party there." Guidry v. Commissioner, 67 T.C.M. (CCH) 2507, 2510 (1994).

the causes of action in the original complaint,[53] the evidence presented and arguments made in the underlying proceeding,[54] the testimony of witnesses,[55] and the jury award if there is one.[56] Even if a complaint was never filed prior to settlement, some courts have still been willing to hear evidence of the potential claims which were settled.[57] After looking at all relevant evidence, the court is then forced to make its best judgment of the weight the payor gave to the separate claims when agreeing to the settlement.[58]

In the other, more troubling line of cases, a few decisions have ruled that if no allocation is made in the settlement agreement, the entire award is automatically taxable.[59] This

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[53] Metzger v. Commissioner, 88 T.C. 834, 848 (1987), *aff'd*, 845 F.2d 1013 (3d Cir. 1988).

[54] Bent v. Commissioner, 87 T.C. 236, 245 (1986), *aff'd*, 835 F.2d 67 (3d Cir. 1987).

[55] Stocks v. Commissioner, 98 T.C. 1, 17 (1992). Illustrating the importance of using the testimony of witnesses as evidence of the proper tax consequences, the plaintiff in *Stocks* had settled prior to trial breach of contract and racial discrimination claims against the defendant. *Id.* at 4-5. The settlement released the defendant from all claims, but did not allocate damages. *Id.* at 5-7. During the testimony of the defendant's vice-president in a trial to determine the proper proration of the settlement amount, the witness refused to acknowledge that any of the settlement went towards the racial discrimination charge. *Id.* at 11-12. Recognizing the defendant would not wish to concede the validity of such a troubling accusation, the court allocated only one-sixth of the settlement to the racial discrimination claim. *Id.* at 17. *See also*, Guidry v. Commissioner, 67 T.C.M. (CCH) 2507, 2510 (1994) (reproving taxpayers for failing to call defendants from prior case to testify to defendants' intent in making settlement).

[56] *Bent*, 87 T.C. at 245. An indication by the trier of fact of the nature of the damages is probably the best evidence of the payor's intent in making a settlement. *Id.*

[57] *See e.g.*, Fitts v. Commissioner, 67 T.C.M. (CCH) 2136, 2139-40 (1994) (allocating settlement damages based on informal claims made in letters from taxpayer to his former employer).

[58] *See generally*, Byrne v. Commissioner, 90 T.C. 1000, 1011 (1988) (stating that in making allocation, court was doing "the best we can on the record before us"); Eisler v. Commissioner, 59 T.C. 634, 641 (1973) (admitting there is no way for court to make precise allocation, and court must simply make "best judgment").

[59] One court explained that in automatically taxing all of a lump sum settlement the court was preventing plaintiffs from picking and choosing between various claims in a general release for tax purposes. Taggi v. United States, 835 F. Supp. 744, 746 (S.D.N.Y. 1993), *aff'd*, 35 F.3d 93 (2d Cir. 1994). Another court

is true even where the court realizes that some portion of the settlement was in payment of a nontaxable claim.[60] In courts that accept this view, a taxpayer can be left with a burdensome tax liability that was avoidable. One decision took a slightly less harsh position by finding the entire settlement would be taxable unless the taxpayer could prove the Commissioner's determination to be arbitrary.[61]

IV. ADVICE FOR PRACTITIONERS

The tax consequences of a settlement should be at the forefront of an attorney's mind during every stage of litigation. From the filing of the complaint to the drafting of the settlement, the attorney must maintain a consistent position as to the characterization of the damages.[62] There are numerous steps an attorney should take to ensure a positive tax treatment.

Avoiding an unfavorable tax treatment begins with the

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noted that to allow taxpayers to retroactively affect the tax consequences of a completed transaction would leave federal tax liabilities unsettled for years. Fono v. Commissioner, 79 T.C. 680, 695 (1982), *aff'd*, 749 F.2d 37 (9th Cir. 1984). *See also*, Evans v. Commissioner, 40 T.C.M. (CCH) 260, 263 (1980) ("In the absence of an allocation of the settlement among the various claims, all of the payment must be included in [taxpayer's] gross income.").

[60] *See,* Whitehead v. Commissioner, 41 T.C.M. (CCH) 365, 368 (1980) (stating where "settlement was made in consideration of a variety of potential claims, including contract as well as tort or tort-type claims and the release . . . did not allocate the payment among these claims . . . the entire amount of the settlement must be included in gross income"); Villaume v. United States, 616 F. Supp. 185, 190 (D. Minn. 1985) ("The parties did not specify at the time of settlement which portion of the settlement was attributable to lost income or business damages, and which portion was attributable to personal injury damages. The Court will therefore treat the entire settlement payment as income.").

[61] Durkee v. Commissioner, 162 F.2d 184, 187 (6th Cir. 1947). The *Durkee* court felt it would be patently unfair to make a taxpayer pay a tax he obviously did not owe. *Durkee*, 162 F.2d at 187.

[62] Nicole Marie Mosesian, Comment, *How to Avoid Unfavorable Tax Consequences for Your Personal Injury Client's Settlement or Judgment*, 30 GONZ. L. REV. 343, 363 (1994-1995). Because the final analysis will be to determine the underlying reason the defendant made the settlement, "the pleadings must consistently and repeatedly emphasize the personal nature of the injury." *Id.* at 352-53. "Essential to any taxpayer's claim is consistency." *Id.* at 364.

original complaint, if one is filed. The IRS believes the complaint to generally be the best evidence of the proper character of a settlement.[63] A complaint should, if possible, include causes of action that are included in the section 104(a)(2) exclusion.[64] Plaintiff's counsel should attempt to establish a physical injury whenever feasible, even if that injury is only a very minor part of the overall suit[65] A recent trend in litigation has been the filing of "kitchen sink" complaints that allege every conceivable type of injury.[66] However, many of these injuries would be taxable if any of the settlement were allocated to them. If the settlement claims to be in consideration of *all* claims, the Service or a reviewing court may allocate money to a taxable claim that was never a vital part of the underlying suit.[67] Complaints should therefore be tailored to include any nontaxable claims that may be involved, while stating only those taxable claims that are essential components of the suit.

Because of the difficulty of meeting the burden of proof if the Service challenges the allocations of the settlement,[68] the attorney should create a written record of the importance of the physical injury claims to the overall suit.[69] Letters to opposing counsel should mention the physical injury aspects of

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[63] Rev. Rul. 85-98, 1985-2 C.B. 51. *See also*, Hodge v. Commissioner, 64 T.C. 616, 620 (1975) (finding for Service because taxpayer did not include personal injury claim in complaint).

[64] Louise Ann Fernandez & Michael G. Dwyer, *New Law Changes the Tax Status of Damages Awards*, 548 PLI/Lit 811, 820 (1996).

[65] *Id.*

[66] *See, e.g.*, Lee v. Life Ins. Co. of N. Am., 829 F. Supp. 529, 534 (D. R.I. 1993) (plaintiffs filed complaint consisting of 45 single-spaced pages of state and federal claims).

[67] Brent B. Nicholas & Douglas K. Chapman, *Enforceability of Settlement Agreement Allocations under Section 104(a)(2) of the Internal Revenue Code*, 47 BAYLOR L. REV. 97, 114 (1995). "A throwaway claim for a non-personal injury may cause the court to apportion some or a greater part of the payment to a taxable item." *Id.* Where the settlement agreement releases all claims against the defendant, a court will generally assume that "all claims" means the claims included in the complaint. Metzger v. Commissioner, 88 T.C. 834, 848-49 (1987).

[68] *See supra* notes 22-24 and accompanying text.

[69] Jeffrey S. Dible, *Excluding Settlements from Taxable Income: Some Old and New Complications*, 39 RES GESTAE 37, 38 (1996).

the claim wherever possible.[70] If settlement seems likely, the attorney may still want to take a short deposition of a non-party witness who can establish the existence of the personal physical injury claims.[71]

When a suit with nontaxable causes of action is settled, including an allocation of the damages in the agreement is the most important step the plaintiff's attorney can take from a tax standpoint. The lack of allocations in the settlement agreement can have very detrimental effects upon the taxpayer. As stated earlier, the taxpayer has the burden of coming forward with evidence that the payor intended for a portion of the settlement to be for nontaxable charges.[72] Without allocations in the settlement agreement, taxpayers frequently can produce no evidence of how the payment was to be allocated, and the total settlement amount, or at least a larger portion than necessary, will be taxable.[73] Even more troubling, some courts will automatically find that any nonallocated amounts are taxable.[74] In such cases, the absence of express allocations is not only detrimental, but fatal. The taxpayer will be

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[70] *Id.* at 38-39. When discussing draft settlement, attorneys should use letters instead of phone calls, and if phone calls are used, a self-serving letter can be sent reminding the opposing party the conversation took place. *Id.*

[71] *Id.* at 38.

[72] *See supra* notes 22-24 and accompanying text.

[73] *See e.g.*, Taylor v. Commissioner, 70 T.C.M. (CCH) 729, 733 (1995) (allocating all damages to taxable claims after taxpayer could only present her own self-serving testimony as to what payment was to settle); Britell v. Commissioner, 69 T.C.M. (CCH) 2904, 2907-08 (1995) (same). In a slightly different context, a good illustration of the difficulty of parties in proving that some portion of a lump-sum settlement should be allocated to nontaxable damages occurs with employees fired in programmatic reductions in force ("RIFs"). F. Philip Manns, Jr., *Down and Out: RIFed Employees, Taxes, and Employment Discrimination Claims after* Burke *and* Schleier, 44 U. KAN. L. REV. 103, 131 (1995). These fired employees are often paid an amount based upon a formula tied to annual salary and length of service. *Id.* at 132. They are required to sign a waiver of all discrimination claims against the employer in return for the payment, even though the employees with potential claims receive no more than employees not in protected groups. *Id.* at 133. If there is no allocation in the termination agreement, the employee can produce no other evidence that any portion of the settlement was in response to potential discrimination claims. *Id.*

[74] *See supra* notes 59-61 and accompanying text.

left with tax liabilities that were easily avoidable. An attorney who has neglected to allocate settlement damages has failed in her duty of care to her client,[75] and may even be subject to a legitimate legal malpractice claim.

Numerous decisions state that a court will not be "bound by express allocations in a written settlement agreement if the parties did not engage in bona fide, arm's-length, adversarial negotiations" in allocating the award.[76] However, in the most common situation, the parties are only adverse to the amount of the settlement, and the defendant is indifferent to the actual allocations.[77] In such a case, the plaintiff's attorney is faced with the impossible task of trying to negotiate with an adverse party when none exists. The plaintiff's attorney must then strive to allocate damages in good faith, consistent with the pleadings and evidence of the suit, but allocating no more than is absolutely necessary to taxable causes of action. The attorney must achieve positive tax results while avoiding impermissible overreaching. The attorney will be further restricted if there is a jury verdict that allocated damages, for courts usually view the jury's determination as strong evidence of the actual substance of the claim and settlement.[78]

If the settlement is to settle "any and all claims," the parties may be hesitant not to allocate at least some portion to taxable claims that, although minor, may still be technically subject to litigation.[79] One way to deal with this problem is to allocate a nominal portion of the settlement to "any and all

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[75] Elwood, *supra* note 2, at 35.

[76] McKay v. Commissioner, 102 T.C. 465, 482 (1994). *See also*, Robinson v. Commissioner, 102 T.C. 116, 127 (1994) (finding that in absence of settlement allocations entered into by parties in adversarial context at arm's length, court will determine proper allocation by examining all facts and circumstances of underlying case), *aff'd in part, rev'd in part*, 70 F.3d 34 (5th Cir. 1995).

[77] Typical of the relationship between plaintiffs and defendants after a settlement amount is reached is the response of one defense attorney to the question of allocation: "We don't care how you do it, just so it is paid and we can get it over with, and we will cooperate with you in any way you see fit. If you can get any tax benefit, fine." *Robinson*, 102 T.C. at 122 n.12.

[78] *See supra* note 56.

[79] Nicholas & Chapman, *supra* note 67, at 114-15.

other claims."[80] Alternatively, the settlement could include language acknowledging that only the allocated claims are valid.[81]

If feasible the attorney should involve the trial judge in the settlement negotiations. Courts will give little consideration to a trial judge's approval of a settlement where the judge merely "rubber stamped" the final agreement of the parties.[82] A reviewing court is much more likely to defer to the terms of a settlement when the trial judge took an active role in creating a fair agreement.

Finally, after all damages are allocated and the settlement is signed, an attorney should discourage her client from overreaching and claiming that some additional portion of the settlement was in regard to a nontaxable injury.[83] Such activity only raises a red flag for the Service to challenge the settlement agreement. Further, if the client does not follow the allocations in the agreement, a reviewing court will likely disregard the express allocations altogether.

V. CONCLUSION

The attorney of a client suing under a bundle of rights, some taxable and some not, must be ever mindful of how a settlement award will be characterized for tax purposes. An attorney must produce an allocation of damages that satisfies her client, the opposing counsel, the Internal Revenue Service, and the courts, a responsibility King Solomon would find daunting. Despite the difficulty of this task, the attorney owes her client a duty to see that the client incurs no greater tax burden than is absolutely necessary.[84]

The plaintiff's attorney must first draft a complaint that includes as many nontaxable, and as few taxable, claims as

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[80] *Id.* The nominal allocation serves to recognize that those claims were only possible, and were not part of the substantial claims that were the basis of the settlement. *Id.*

[81] *Id.*

[82] *See supra* notes 46-47 and accompanying text.

[83] Dible, *supra* note 69, at 38.

[84] *See supra* note 2 and accompanying text.

possible.[85] All letters and pleadings should reflect that the physical injury component of the controversy is an important part of the overall suit.[86] A settlement agreement must include an allocation of damages of some sort, with as much of the award as practical allocated to nontaxable causes of action.[87] If possible, the opposing party and the trial judge should be involved in allocating the damages.[88] Finally, the attorney and her client must always act in good faith with the Service, never overreaching to such an extent that the settlement agreement allocations will be disregarded.[89]

M. Sean Sullivan

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[85] *See supra* notes 63-67 and accompanying text.
[86] *See supra* notes 68-71 and accompanying text.
[87] *See supra* notes 73-75 and accompanying text.
[88] *See supra* note 82 and accompanying text.
[89] *See supra* note 83 and accompanying text.

RECENT DECISION

INSURANCE — DUTY TO DEFEND — DEFENSE UNDER RESERVATION OF RIGHTS REQUIRES INSURER TO PROVIDE INDEPENDENT COUNSEL TO INSURED

The law firm of Fuselier, Ott and McKee purchased a liability insurance policy issued by American Guarantee and Liability Insurance Company.[1] In a lawsuit against the firm filed by a discharged member, American Guarantee agreed to defend the entire suit under a reservation of rights and selected its own defense counsel.[2] The firm also retained counsel at its own expense.[3] Following a judgment in favor of the

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[1] Moeller v. American Guar. and Liab. Ins. Co., No. 92-CA-00829-SCT, 1996 WL 532387, at *1 (Miss. Sept. 19, 1996).

[2] *Moeller*, 1996 WL 532387, at *3. In the original action Armin J. Moeller, the discharged member of the firm, sued the firm alleging misrepresentation, fraud, and damage to his reputation and career. *Id.* at *1. The policy issued by American Guarantee covered injury resulting from defamation but excluded "personal injury by any person as a result of an offense directly or indirectly related to the employment of such person by the named insured." *Id.* at *2. The policy required American Guarantee to defend any suit against the insureds for such personal injury even if the allegations were groundless, false or fraudulent. *Id.* American Guarantee initially denied coverage of the allegations, but later agreed to defend all claims whether covered or not under a reservation of rights. *Id.* at *3. American Guarantee retained the firm of Heidelberg, Woodliff & Franks to defend the lawsuit. *Moeller*, 1996 WL 532387, at *4.

[3] *Id.* The firm requested that American Guarantee retain the firm's selected

discharged member,[4] American Guarantee sought a declaratory judgment that it had properly fulfilled its duty to defend the firm.[5] The firm counterclaimed requesting attorney's fees and expenses incurred in defending the suit.[6] Moeller, the discharged employee, also filed a counterclaim against American Guarantee seeking actual damages, punitive damages and attorney's fees.[7]

After trial in Hinds County Chancery Court, the special chancellor held that American Guarantee had fulfilled its duty to defend and denied the firm's claim for attorney's fees.[8] On appeal, the Mississippi Supreme court held: Affirmed in part, reversed in part and remanded.[9] The court held that where an insurer defends all claims in a third party suit under a

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counsel, Charles Brocato, to defend the suit, but American Guarantee did not. *Id.* at *3.

[4] *Id.* at *1-*2. The original action by Moeller resulted in a judgment against the firm for over $19,000. *Id.*

[5] *Id.* at *4. Specifically, American Guarantee sought a judgment that it had properly fulfilled its duty to defend the suit, that it had properly reserved its rights to disclaim coverage, and that it was not responsible for any part of the judgment against the firm. *Id.* The insurer also sought judgment that none of the counts in the former employee's complaint were covered under the policy and that the insurer was not required to defend the firm on appeal. *Id.*

[6] *Id.* at *4. Throughout the course of the trial, the firm's counsel cooperated with American Guarantee's chosen counsel in the defense of the suit. *Id.* at *5.

[7] *Moeller*, 1996 WL 532387, at *5. Moeller sought attorney's fees incurred in defense of the counterclaim against him filed by the firm in the underlying action. *Id.* Moeller alleged that he was also an insured under the terms the firm's liability policy and was therefore entitled to defense counsel provided by American Guarantee. *Id.* Moeller also sought damages resulting from American Guarantee's failure to notify him that he was an insured under the policy. *Id.*

[8] *Id.* at *6. The chancellor held that American Guarantee had properly defended the firm under a reservation of rights and was not required to pay for the defense counsel retained by the firm. *Id.* The chancellor ruled that American Guarantee did have an obligation to defend Moeller in the counterclaim by the firm and Moeller was therefore entitled to recover the expenses incurred in defending the counterclaim. *Id.* The chancellor also held that Moeller was not entitled to punitive damages as a result of American Guarantee's failure to notify him that he was covered under the policy. *Id.*

[9] *Id.* at *1. The supreme court affirmed the chancellor's award of attorney's fees to Moeller and the denial of punitive damages. *Id.* The court reversed the chancellor's refusal to award the firm the expenses incurred in defending the suit and remanded the case for a determination of reasonable attorney's fees. *Id.*

reservation of rights, the insurer must pay the reasonable legal expenses of defense counsel selected by the insured.[10]

I. RELATED LAW

A. *The Insurer's Duty to Defend Third Party Claims*

In the early case of *United States Fidelity & Guaranty Co. v. Yazoo Cooperage Co.*,[11] the Mississippi Supreme Court allowed recovery of legal expenses based on the insurer's wrongful refusal to defend a third party suit against the insured.[12] In *Yazoo Cooperage*, the plaintiff sought recovery for attorney's fees and court costs after the insurer refused to defend a suit by a third party which as alleged was within the coverage of the insurance policy.[13] The Mississippi Supreme

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[10] *Id.* at *9. The court reasoned that the insurer's defense of uncovered claims under a reservation of rights created a conflict of interest. *Id.* Because the insurer chose to defend all claims with a reservation of rights, the insureds had the right to select their own counsel to defend the claims outside the coverage of the policy. *Id.*

[11] 127 So. 579 (Miss. 1930).

[12] *Yazoo Cooperage*, 127 So. at 580. Typical general liability policies obligate the insurer to indemnify the insured for covered losses and to defend the insured against third party claims. John H. Mattias, Jr. et al., *Tripartite Relationships and Reservation of Rights Letters: The Need for Independent Counsel*, *in* INSURANCE COVERAGE LITIGATION 1994, at 253, 256 (PLI Litig. & Admin. Practice Course Handbook Series No. 516, 1994). The provision obligating the insurer to defend the insured also gives the insurer the right to exclusive control over the litigation. Todd R. Smyth, J.D., Annotation, *Duty of Insurer to Pay for Independent Counsel When Conflict of Interest Exists Between Insured and Insurer*, 50 A.L.R. 4TH 932, 937 (1986). Standard policies require that the insurer defend even "groundless, false, or fraudulent" claims. Kenneth L. Miller & Christina L. Nargolwala, *The Insurer's Duty to Defend: Overview, Recent Developments and Ethical Considerations*, *in* 10TH ANNUAL INSURANCE, EXCESS, AND REINSURANCE COVERAGE DISPUTES, LITIGATION 1993, at 489, 493-94 (PLI Litig. & Admin. Practice Course Handbook Series No. 454, 1993). If the insurer breaches the insurance contract by wrongfully refusing to defend a suit against the insured, the insurer may be liable for the amount of settlement or judgment and the expenses incurred by the insured in defending the suit. Commercial Cas. Ins. Co. v. Tri-State Transit Co., 1 So. 2d 221, 225 (Miss. 1941). *See generally*, 44 AM. JUR. 2D *Insurance* §§ 1416-1417 (1982) (stating that wrongful refusal to defend is breach of contract by insurer subjecting insurer to liability for amount of judgment, settlement and defense expenses).

[13] *Yazoo Cooperage*, 127 So. at 579. The insurance policy issued by USF&G

Court held that the insurer's duty to defend an action against the insured is based on the allegations of the third party's declaration.[14]

The Mississippi Supreme Court clarified the insurer's duty to defend in *Southern Farm Bureau Casualty Insurance Co. v. Logan*.[15] In *Logan*, the injured party brought an action against an insurance company to recover a judgment against the insured.[16] In addressing the insurer's duty to defend, the Mississippi Supreme Court held the allegations of the complaint in the third party action, not the ultimate liability of the insurer, are the criteria for determining the insurer's duty to defend.[17] In subsequent decisions, the Mississippi Supreme

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covered claims for bodily injuries and death suffered by employees of the insured. *Id.* The declaration filed against the insured claimed that the decedent was an employee. *Id.* at 580. USF&G refused to defend the claim on the grounds that the decedent was in fact not an employee of the insured and was outside the policy's coverage. *Id.*

[14] *Id.* at 580. The insurance company should look to the form and contents of the declaration in determining its duty to defend a third party claim. Employers Mut. Liab. Ins. Co. v. Maryland Cas. Co., 206 F. Supp. 589, 593 (S.D. Miss. 1961); *see also* Commercial Cas. Ins. Co. v. Tri-State Transit Co., 1 So. 2d 221, 223 (Miss. 1941) (stating that insurer has duty to defend if facts as alleged are sufficient to show that claim is covered under policy). Conversely, an insurer does not have an obligation to defend actions based on claims not covered by the policy. 14 GEORGE J. COUCH ET AL., COUCH CYCLOPEDIA OF INSURANCE LAW § 51:42 (2d ed. 1982).

[15] 119 So. 2d 268, 271 (Miss. 1960).

[16] *Logan*, 119 So. 2d at 270. Thomas Logan's complaint in the original action alleged he was injured while attempting to reenter the insured's truck after loading and unloading the vehicle. *Id.* at 269. After Logan rejected a settlement offer, the insurance company refused to defend the insured asserting that Logan was an employee of the insured and excluded from coverage by the terms of the policy. *Id.* at 269-70. Default judgment was entered against the insured, and Logan filed the present suit pursuant to a provision in the insurance policy allowing an injured third party to sue the insurer after obtaining judgment against its insured. *Id.* at 270. The chancery court granted Logan's request for an interlocutory appeal to determine the insurer's duty to defend. *Id.*

[17] *Id.* at 271. The court reasoned that although the insurer's liability to pay the judgment would depend on whether Logan was in fact an employee, the insurer's duty to defend did not. *Id.* Because the complaint did not allege that Logan was an employee, the insurer was obligated to defend the suit. *Id.* The insurer's duties to defend and indemnify are independent, and the duty to defend is broader than the duty to indemnify. Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 477 (1996); *see*

Court extended the insurer's duty to defend to include cases where, although the policy did not cover the facts alleged, the insurer knew or ascertained that the actual facts would bring the claim within the policy's coverage.[18]

B. Conflict of Interest Situations

1. Duty of Insurer and Defense Counsel

In *Hartford Accident & Indemnity Co. v. Foster*,[19] the Mississippi Supreme Court addressed the duties of insurance carriers and defense attorneys when presented with a conflict of interest.[20] In *Hartford*, the insured sued his insurance carrier for bad faith refusal to settle and sued the defense counsel for breach of fiduciary duty.[21] The Mississippi Supreme Court adopted the view that the insurer has a fiduciary obligation to consider the interests of the insured to the same extent as its own.[22] The court also held that in a conflict of interest situa-

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Travelers Indem. Co. v. East, 240 So. 2d 277, 279 (Miss. 1970) (noting that insurer's obligation to defend is separate and distinct from duty to pay). The insurer may be obligated to defend even though it may not ultimately be required to pay. Miller & Nargolwala, *supra* note 12, at 495-96.

[18] State Farm Mut. Auto. Ins. Co. v. Taylor, 233 So. 2d 805, 808 (Miss. 1970). The insurer has a duty to defend where a "divergence [exists] between facts as alleged in petition and actual facts as they are known or reasonably ascertainable by insurer". *Id.*; *see* Mavar Shrimp & Oyster Co. v. United States Fidelity & Guar. Co., 187 So. 2d 871, 874 (Miss. 1966) (stating that insurer was obligated to defend where declaration alleged facts not within terms of policy, but insurer knew allegations were false).

[19] 528 So. 2d 255 (Miss. 1988).

[20] *Hartford*, 528 So. 2d at 257. The conflict of interest in *Hartford* involved an offer to settle the third party claim within the limits of the liability insurance policy. *Id.* at 270. The insured favored settlement to avoid personal liability. *Id.* at 260-61. However, the insurer favored litigation because of the prospect of defeating liability altogether. *Id.*

[21] *Id.* at 260. The insurer, Hartford Accident & Indemnity, assumed the defense of a third party suit against Foster. *Id.* at 257-58. Hartford, believing that Foster would not be found liable, refused to accept a settlement offer within the policy limits. *Id.* at 260-62. Following a judgment in excess of the policy limits, Foster filed the present action against Hartford alleging that Hartford acted in bad faith and breached a duty to him by failing to consider his interests. *Id.* Foster also filed a complaint against the defense counsel alleging that counsel breached their duty to Foster by giving preference to Hartford. *Id.* at 260.

[22] *Id.* at 263, 266. Although, the insurance company has a contractual right to

tion, the insurer's appointed defense counsel should not represent both the insurer and insured unless both clients consent.[23] The supreme court noted in dicta that an insurer's defense under a reservation of rights because of a coverage dispute may create a conflict requiring the insurance company to pay for independent counsel to protect the insured's interests.[24]

2. *Conflict Created by Reservation of Rights*

In *San Diego Navy Federal Credit Union v. Cumis Insurance Society*,[25] the California Court of Appeals directly addressed an insured's right to independent counsel when the insurer defends under a reservation of rights.[26] In *Cumis*, the

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choose the defense counsel and control the defense, it is not allowed to pursue a defense which is prejudicial to the insured's monetary interest. *Id.* at 269; *see also* Ezell v. Hayes Oilfield Constr. Co., 693 F.2d 489, 493 (5th. Cir. 1982) (stating that Mississippi law requires insurer to provide defense for best interests of insured); State Farm Mut. Auto. Ins. Co. v. Commercial Union Ins. Co., 394 So. 2d 890, 894 (Miss. 1981) (stating that insurer's duty to defend requires good faith effort to protect insured's interests in court).

[23] *Hartford*, 528 So. 2d at 268. Both the insurer and the insured are clients of the defense counsel employed by the insurer. *Id.* at 270. An attorney's ethical obligations prevent dual representation in a conflict situation unless the attorney determines that he can faithfully represent both clients and obtains consent from both the insurer and the insured. *Id.* at 268; *see* MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.7(b)(1987) (prohibiting dual representation in conflict of interest situation unless lawyer believes "the representation will not be adversely affected" and client has given "knowing and informed consent").

Many courts have rejected the idea that an attorney's ethical obligations will prevent favoritism to the insurer. Ronald E. Mallen, *A New Definition of Insurance Defense Counsel*, 53 INS. COUNS. J. 108, 109 (1986). The rationale for believing that defense counsel will favor the interests of the insurer is based on the on-going and long-standing relationship that defense counsel typically have with insurance companies. *Id.* at 109; *see* United States Fidelity & Guar. Co. v. Louis A. Roser Co., 585 F.2d 932, 938 n.5 (8th Cir. 1978) (stating that attorney may unconsciously slant efforts toward insurance company in hopes of future employment).

[24] *Hartford*, 528 So. 2d at 270. The court stated that when the insurer defends under a reservation of rights to deny coverage of the insured's conduct, the defense counsel employed by the insurer "is presented with an ethical question up front" which may require counsel to withdraw from representation completely. *Id.*

[25] 208 Cal. Rptr. 494 (Ct. App. 1984).

[26] *Cumis*, 208 Cal. Rptr. at 496. The insurer's defense under a reservation of

insureds sought recovery from the insurer for the legal expenses incurred by independent counsel.[27] The California Court of Appeals held the insurer's reservation of rights created a conflict of interest requiring the insurer to pay the reasonable cost of the insureds' independent counsel unless the insureds consented to joint representation.[28] However, be-

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rights is a frequent source of conflict of interest between the insurer and insured. Smyth, *supra* note 12, at 937. Defending under a reservation of rights allows the insurer to reserve the right to deny coverage of a claim despite its initial decision to defend. Douglas R. Richmond, *Walking an Ethical Tightrope: The Tripartite Relationship Between Insurer, Insured, and Insurance Defense Counsel*, 73 NEB. L. REV. 265, 272 (1994). *See* Employers Reinsurance Corp. v. Martin, Gordon & Jones, Inc., 767 F. Supp. 1355, 1363 (S.D. Miss. 1991) (noting that reservation of rights allows insurer to proceed with vigorous defense while preserving right to determine coverage at later date). Otherwise, the insurer must choose between defending the entire suit, risking estoppel to deny coverage, and refusing to defend thereby surrendering control of the defense and risking liability for wrongful refusal. Eric M. Holmes, *A Conflict-of-Interests Roadmap for Insurance Defense Counsel: Walking an Ethical Tightrope Without a Net*, 26 WILLAMETTE L. REV. 1, 38-40 (1989). *See* Reliance Ins. Co. v. County Line Place, Inc., 692 F. Supp. 694, 698 (S.D. Miss. 1988) (noting that proceeding under reservation of rights is "most often the prudent course of action for an insurer").

[27] *Cumis*, 208 Cal. Rptr. at 496. A third party action alleging intentional tort and contract causes of action was filed against the insureds. *Id.* Cumis Insurance Society, the insurer, assumed the defense but reserved the right to deny coverage. *Id.* The defense counsel hired by Cumis felt that the policy did not cover willful conduct or breach of contract. *Id.* Upon receipt of the insurer's reservation of rights letter, the insureds retained independent counsel to act as co-counsel. *Id.* at 497. After making two payments for the cost of the insureds' independent counsel, Cumis refused to make further payment claiming independent counsel was unnecessary because no conflict of interest existed. *Cumis*, 208 Cal. Rptr. at 497. The insureds then filed the present action against Cumis seeking to recover the remainder of the legal expenses for independent counsel. *Id.*

[28] *Id.* at 506. The court reasoned that because the insurer was obligated to defend the suit and the insured is entitled to control the defense in a conflict situation, the insurer must pay for the insured's independent counsel retained to defend to suit. *Id.* at 501-02. *See* Rhodes v. Chicago Ins. Co., 719 F.2d 116, 120-21 (5th Cir. 1983) (holding that in conflict situation created by insurer's defense under reservation of rights, Texas law allows insured to refuse insurer's offer of defense and select independent counsel at insurer's expense); Maryland Cas. Co. v. Peppers, 355 N.E.2d 24, 31 (Ill. 1976) (holding that in conflict of interest situation where insurer refuses to defend without reservation of rights, insurer's contractual obligation to defend requires insurer to reimburse insured for reasonable cost of independent counsel); Bryan v. State-Wide Ins. Co., 533 N.Y.S.2d 951, 953 (N.Y. App. Div. 1988) (stating insured is entitled to select defense counsel at insurer's expense when potential conflict of interest exists).

cause of the negative effects of the *Cumis* holding[29], the California courts clarified *Cumis* in subsequent decisions by stating not every reservation of rights created a conflict of interest that would require the insurer to provide independent counsel to the insured.[30]

The Supreme Court of Alaska addressed the insured's entitlement to independent counsel when the insurer defends under a reservation of rights in *CHI of Alaska v. Employers Reinsurance Corp.*[31] In *CHI*, the insured brought a declaratory action asserting its right to select independent counsel because of a conflict of interest created by the insurer's defense under a reservation of rights.[32] In reversing the lower court's

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[29] Michael J. Brady & Heather A. McKee, *Ethics in Insurance Defense Context: Isn't Cumis Counsel Unnecessary?*, 58 DEF. COUNS. J. 231, 232-33 (1991). Requiring "Cumis counsel" in every reservation of rights situation had several adverse effects in jurisdictions which followed the California Court of Appeals' holding. *Id.* Problems associated with requiring "Cumis counsel" in every reservation of rights situation included false conflicts of interest asserted by unscrupulous attorneys, excessive fees charged by the independent counsel, and the insured's selection of counsel with little or no experience in complex insurance litigation. *Id.* at 233.

[30] McGee v. Superior Court, 221 Cal. Rptr. 421, 424 (Ct. App. 1985). The California courts limited the *Cumis* holding to cases where coverage would be affected by the development of the underlying litigation. *Id.*; *see* Foremost Ins. Co. v. Wilks, 253 Cal. Rptr. 596, 602 (Ct. App. 1988) (stating that no conflict exists when reservation of rights is based on coverage issues which are unrelated to underlying litigation); CAL. CIV. CODE § 2860 (West 1993) (stating that conflict of interest is created by reservation of rights when outcome of coverage issue can be controlled by insurer's appointed defense counsel). *See also* Nisson v. American Home Assurance Co., 917 P.2d 488, 490 (Okla. Ct. App. 1996) (noting independent counsel not necessary where no "threat of divided loyalty" exists between insurer and insured). An insurer's reservation of rights based on policy defenses, such as a breach of a policy condition requiring notice or cooperation, is not related to the underlying litigation and may not present a conflict of interest. Michael A. Berch & Rebecca White Berch, *Will the Real Counsel for the Insured Please Rise?*, 19 ARIZ. ST. L.J. 27, 37-38 (1987). In this situation, the insurer and insured have a common interest in successfully defending the third party action. *Id.*

[31] 844 P.2d 1113, 1115 (Alaska 1993).

[32] *CHI*, 844 P.2d at 1114. The third party's complaint against CHI alleged contract claims, negligence and intentional misrepresentation. *Id.* CHI's insurer agreed to defend the suit only with a reservation of rights to deny coverage of the intentional misconduct claim. *Id.* CHI refused this defense and demanded independent counsel, alleging that the insurer's reservation of rights created a conflict of interest. *Id.* The insurer then offered to provide CHI with independent

decision, the Alaska Supreme Court held when the insurer defends under a reservation of rights a conflict of interest arises entitling the insured to independent counsel.[33] The court also rejected the insurer's "two counsel scheme" as adequate to satisfy the insured's right to independent counsel.[34]

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counsel for the intentional misconduct claim while retaining its own attorneys to act as co-counsel. *Id.* CHI again refused the insurer's offer of defense. *CHI*, 844 P.2d at 1114. The lower court held that the insurer's offer to provide independent counsel for only the intentional misconduct claim adequately resolved the conflict situation. *Id.* at 1115.

[33] *Id.* at 1116. The court noted three conflicts that may arise when the insurer defends under a reservation of rights. *Id.* The insurer may offer only a "token defense" if it knows it may later assert noncoverage. *Id.* The insurer may conduct the defense to favor a verdict based on an uninsured theory of liability. *Id.* Finally, the insurer may gain access to confidential information which could later be used against the insured in coverage litigation. *CHI*, 884 P.2d at 1116. The court stated that when the insured refuses to accept a defense under reservation of rights, the insurer must surrender control of the defense and provide independent counsel to the insured. *Id.* at 1119.

The majority view is that a coverage issue entitles the insured to reject appointed counsel and choose his own counsel to control the litigation at the insurer's expense. Mallen, *supra* note 23, at 113; *see* Previews, Inc. v. California Union Ins., 640 F.2d 1026, 1028 (9th Cir. 1981) (stating California law requires insurer to surrender control of defense in favor of insured when conflict exists); Pepper Constr. Co. v. Casualty Ins. Co., 495 N.E.2d 1183, 1184 (Ill. App. Ct. 1986) (noting that insurer should not participate in defense when conflict of interest exists but should pay costs of insured's defense instead). A minority of jurisdictions reject the need for independent counsel and rely on the lawyer's ethical obligations to prevent a conflict from interfering with the quality of the defense. Mallen, *supra* note 23, at 113; *see* Norman v. Insurance Co. of N. Am., 239 S.E.2d 902, 907 (Va. 1978) (stating that insured may presume that attorney has no interest that would interfere with effective defense). Other jurisdictions protect the insured by imposing an enhanced duty of good faith on the insurer when defending under a reservation of rights. Tank v. State Farm Fire & Cas. Co., 715 P.2d 1133, 1137 (Wash. 1986) (en banc). Failure to meet the enhanced duty of good faith prevents the insurer from denying coverage under the policy. Shelby Steel Fabricators, Inc. v. United States Fidelity & Guar. Ins. Co., 569 So. 2d 309, 312-13 (Ala. 1990).

[34] *CHI*, 844 P.2d at 1119. The court reasoned that the co-counsel arrangement did not eliminate the conflict of interest situation, namely because the insurer's appointed counsel would still have access to confidential information. *Id.* In addition, the court noted that a dispute may arise as to which counsel would control discovery and strategic decisions. *Id.* at 1120, n. 13. *But cf.* American Family Life Assurance Co. v. United States Fire Co., 855 F.2d 826, 831-32 (11th Cir. 1989) (noting where insured retained independent counsel to monitor and aid defense, insurer is obligated to co-operate with insured's counsel); Northland Ins. Co. v.

Finally, the court held that the insured has the unilateral right to select independent counsel.[35]

II. MOELLER V. AMERICAN GUAR. & LIAB. INS. CO.

A. Opinion of the Court

In *Moeller v. American Guarantee and Liability Insurance Co.*,[36] the Mississippi Supreme Court addressed the issue of whether an insurer must pay for independent counsel for the insured when the insurer defends under a reservation of rights. The supreme court acknowledged that, under Mississippi law, the insurer has a contractual obligation to furnish a legal defense to claims against the insured covered under the insurance policy and to pay "all sums the insured becomes legally obligated to pay" within the limits of the policy.[37] The court then noted that when policy coverage is questionable, the insurer may defend the suit while reserving its right to deny coverage later.[38] The *Moeller* court stated that defending the suit under a reservation of rights "presented a clear conflict of interest between the insurer and the insured."[39] The court reasoned that the insurer's appointed

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Heck's Serv. Co., 620 F. Supp. 107, 108 (E.D. Ark. 1985) (holding insured entitled to independent counsel to defend uncovered claims while insurer's counsel defends covered claims).

[35] *CHI*, 844 P.2d at 1120. Other jurisdictions give the insurer the right to participate in the selection of the insured's independent counsel. Federal Ins. Co. v. X-Rite, Inc., 748 F. Supp. 1223, 1228-29 (W.D. Mich. 1990).

[36] No. 92-CA-00829-SCT, 1996 WL 532387, at *1 (Miss. Sept. 19, 1996).

[37] *Moeller*, 1996 WL 532387, at *6. The *Moeller* court noted that the insurer has a right to select defense counsel because the insurer must indemnify the insured for any amount within the policy that the insured is obligated to pay. *Id.*

[38] *Id.* at *7. The court recognized that the insurer must defend the suit when the allegations of the complaint are clearly covered by the policy, but when the allegations are clearly not covered, the insurer has no duty to defend. *Id.* The court also noted that in some situations the allegations may be ambiguous so that coverage is unclear or that facts uncovered at trial may affect coverage of the claim. *Id.*

[39] *Id.* at *9. The court noted three conflicts of interest when the insurer defends under a reservation of rights: the insurer may offer only a "token defense" because of its ability to later assert noncoverage; where alternate theories of recovery exist, the insurer may defend the suit to favor the uninsured theory; or

counsel could not faithfully represent both clients in defending covered and noncovered claims; therefore, the insurer had an obligation to allow the insureds to choose their own counsel.[40]

The Mississippi Supreme Court also addressed the duty of the attorney retained by the insurance carrier.[41] The court stated when attorneys encounter a potential or actual conflict of interest they should refrain from representing both clients.[42] Finally, the supreme court addressed the issue of punitive damages and determined that the insurer's misconduct was not so egregious as to make punitive damages appropriate.[43]

B. Dissenting Opinion

Presiding Justice Sullivan, joined by Justice McRae, wrote a dissenting opinion arguing the insurer's misconduct was sufficient to justify an award of punitive damages and asserting the court should remand Moeller's counterclaim for a factual determination of punitive damages.[44]

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the insurer may use confidential information obtained during the defense in a subsequent coverage dispute. *Id.* at *7 (citing *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1116 (Alaska 1993)).

[40] *Moeller*, 1996 WL 532387, at *9. The court stated that because the insurer chose to defend all claims, the insurer was required to pay the reasonable cost of the insured's independent counsel. *Id.*

[41] *Id.* at *8. The court stated that the attorney retained by the insurance carrier has an "ethical and professional" duty to represent both the insurer and the insured. *Id.* The court also pointed out that in most situations the claim is covered by the policy; therefore, this dual representation does not present a conflict of interest. *Id.*

[42] *Id.* The court stated that the attorney's initial inquiry should be whether a potential conflict of interest exists between the insurer and the insured, and if so, the attorney should attempt only to represent the insurer and defend only claims covered by the policy. *Id.* The supreme court also explained that if a conflict arises after the attorney has assumed representation of both clients, the attorney should withdraw altogether if ceasing to represent one would injure the other. *Id.*

[43] *Id.* at *12. The court stated that punitive damages may be available when the insurer's misconduct amounts to "some willful or malicious wrong or the gross negligence or reckless disregard for the rights of others." *Id.* at *11.

[44] *Id.* at *13 (Sullivan, P.J., dissenting). The dissenters felt that the insurer's actions were both grossly negligent and intentional misconduct. *Id.* The dissent also criticized the majority for focusing on Moeller's state of mind and not concen-

III. DISCUSSION

In *Moeller v. American Guarantee and Liability Insurance Co.* the Mississippi Supreme Court joined a significant number of jurisdictions in requiring insurance carriers to provide independent counsel to the insured when defending under a reservation of rights.[45] However, the *Moeller* opinion does not make clear whether every reservation of rights automatically creates a conflict of interest requiring the insurer to pay for independent counsel.[46] Because not every reservation of rights is based upon coverage disputes that may be affected during the course of the underlying litigation,[47] the better reasoned interpretation is that only a reservation of rights which creates a potential or actual conflict of interest requires the insurer to pay for independent counsel to the insured.[48]Also, the *Moeller* opinion does not clarify the role of the insured's counsel in the defense of the third party action.[49] Allowing both the insurer's counsel and the insured's

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trating on the insurer's actions. *Id.* at *14.

[45] *See supra* notes 12, 23, 28 and accompanying text. Requiring the insurer to pay for independent counsel fulfills the insurer's duty to defend and eliminates any favoritism the defense counsel may have toward the insurer. *See supra* notes 12, 23, 28 and accompanying text.

[46] Moeller v. American Guar. & Liab. Ins. Co., No. 92-CA-00829-SCT, 1996 WL 532387, at *9 (Miss. Sept. 19, 1996). The court makes clear that defending noncovered claims under a reservation of rights creates a conflict of interest and that the insured is entitled to independent counsel in this situation. *Id.* However, the opinion does not address whether the holding also applies to an insurer's reservation of rights predicated upon policy defenses. *Id.*

[47] *See supra* note 30 and accompanying text. The manner of conducting the defense in the underlying action is unlikely to affect the outcome of a dispute based on a breach of policy conditions by the insured. *See supra* note 30 and accompanying text.

[48] *See supra* note 29 and accompanying text. The duty of the insurer to provide independent counsel should depend on the reasons for asserting a reservation of rights. *See supra* note 30. Requiring the insurer to pay for independent counsel in every situation where the insurer asserts a reservation of rights, regardless of whether a conflict exists, may lead to more costly insurance litigation and other adverse consequences. *See supra* note 29 and accompanying text.

[49] *Moeller*, 1996 WL 532387, at *9. The opinion states the insured may select independent counsel to defend claims outside the coverage of the policy, indicating that the insurer may also retain counsel to defend the covered claims. *Id.*

selected counsel to participate in the defense may cause confusion when a dispute arises concerning defense strategy and control.[50] To protect the insured's interests and give effect to the requirement of independent counsel, the insured's selected defense attorney should control the defense.[51]

Finally, the *Moeller* opinion reaffirms the ethical responsibilities of insurance defense counsel. By requiring the insurer's appointed defense counsel to recognize a conflict of interest and restrict representation accordingly, the *Moeller* opinion emphasizes the absolute loyalty an attorney owes a client.[52]

IV. Conclusion

The *Moeller* opinion indicates Mississippi's desire to define the duties of insurance companies when conducting the defense of a claim against their insured. Although the application of *Moeller* will require clarification by the courts in future litigation, the decision provides much needed guidance for insurers, insureds and defense counsel.

Amy Bland

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[50] *See supra* note 34 and accompanying text. In addition, allowing the insurer's appointed counsel to participate in the defense may not fully eliminate all potential conflicts of interest. *See supra* note 34 and accompanying text.

[51] *See supra* notes 23, 28, 33 and accompanying text. The proper role of the insurer's defense counsel should be to monitor the defense, recognizing the insured's selected counsel as the ultimate decisionmaker. *See supra* notes 23, 28, 33 and accompanying text.

[52] *See supra* notes 23, 24 and accompanying text. Independent counsel to the insured may provide the only solution to an attorney's ethical dilemma of representing two clients with conflicting interests. *See supra* notes 23, 24 and accompanying text.

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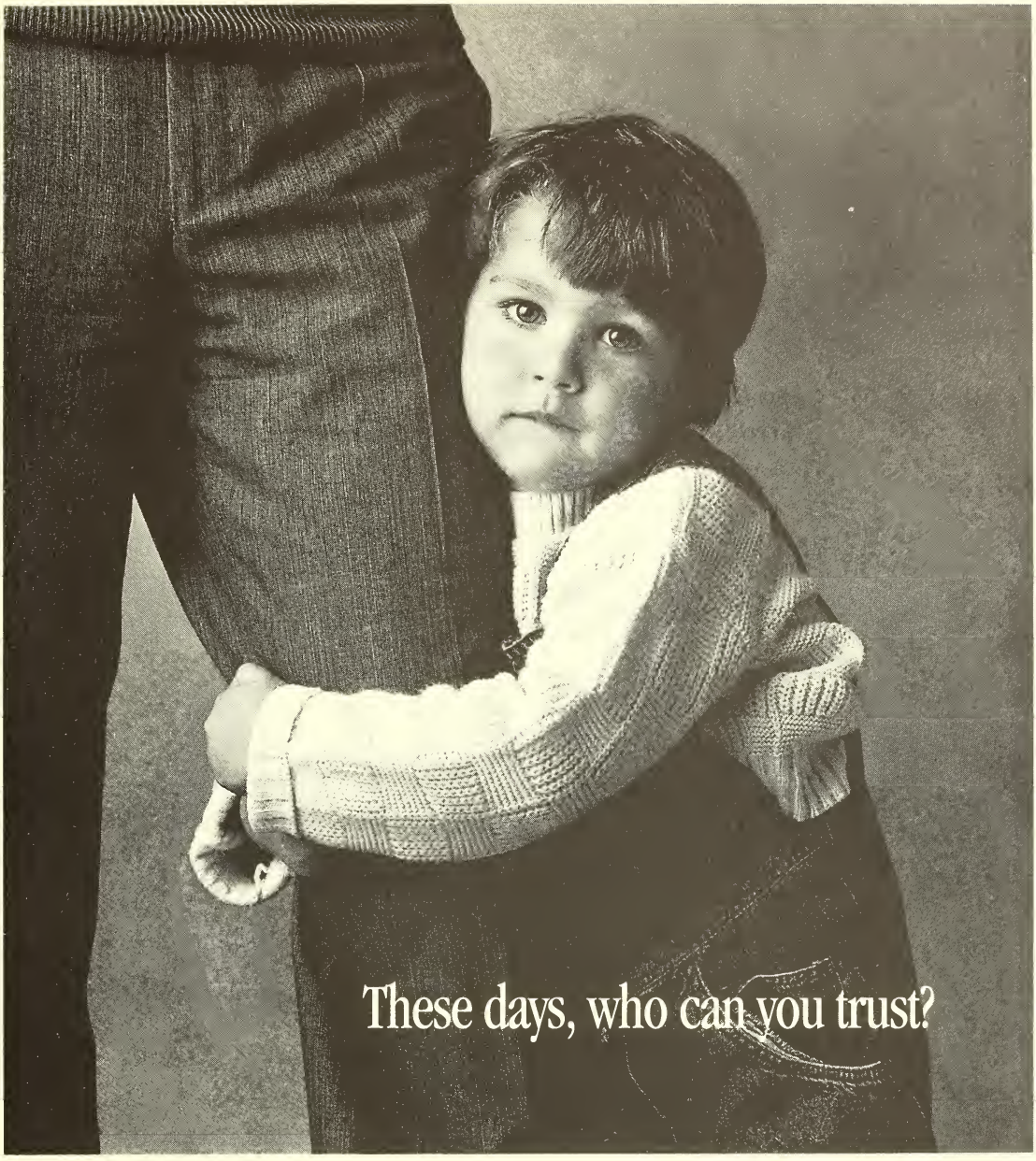

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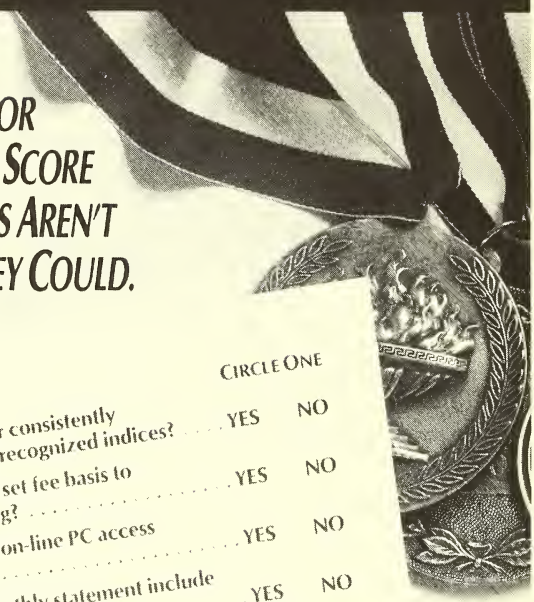

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